EXHIBIT 43

355 F.2d 854 (1966)

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
MAJESTIC WEAVING CO., Inc., Respondent,
Local 815, International Brotherhood of Teamsters, Intervenor.

No. 61, Docket 29601.

United States Court of Appeals Second Circuit.

Argued October 20, 1965.

Decided January 4, 1966.

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George B. Driesen, Washington, D. C. (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Elliott Moore, Washington, D. C., Atty.), for petitioner.

Irving Rozen, New York City (Weisman, Allan, Spett & Sheinberg, Walter A. Stein, New York City, of counsel), for respondent.

Henry I. Hamburger, Nemeroff, Jelline, Danzig, Paley & Kaufman, New York City, for intervenor.

Before WATERMAN, MOORE and FRIENDLY, Circuit Judges.

FRIENDLY, Circuit Judge:

The National Labor Relations Board petitions to enforce an order ruling that the respondent, Majestic Weaving Co., Inc., rendered unlawful assistance to a union attempting to organize its plant, executed an invalid union security agreement, and unlawfully refused to bargain with the proper representative of its employees. National Labor Relations Act §§ 8(a) (1), (2), and (5). Most of the General Counsel's claims were rejected by the Board and are not here at issue. The Trial Examiner's findings, which the Board adopted although disagreeing with his conclusion, can be briefly stated.

Majestic, a corporation newly organized for the production and distribution of printed fabrics, began hiring employees for a plant under reconstruction at Cornwall, N. Y., in February 1963. The employees were told they would first perform tasks necessary to getting the plant in operation; thereafter most of them would be trained in a number of finishing and printing skills, although some craftsmen who were adept as welders, pipefitters or electricians might continue as such. On February 13, Sanderman and Friedman, representatives of Local 815, International Brotherhood of Teamsters, visited the plant and told the manager, Thomasis, that the Local represented some of the employees. Thomasis called in Majestic's labor relations consultant, Hardy, who met with the union representatives that afternoon. Sanderman repeated that Local 815 had signed up some employees, desired recognition and would like to negotiate a contract. Hardy, explaining that Majestic was just getting started and had engaged only a dozen of its work force, said he had no objection to beginning to negotiate and discuss a proposed contract provided Local 815 could show at the conclusion that it represented a majority of the employees. Sanderman and Friedman asked if they could make a tour of the plant; Hardy assented and offered to take them through. Shortly thereafter Sanderman detached himself to talk to three

employees, rejoined Hardy and Friedman, and then, having "spotted a gentleman who was a little bit older" than the other employees, left the group and introduced himself. He asked whether the gentleman, Weyant Felter, had been a member of the union and, on receiving an affirmative response, explained his mission. With the aid of Friedman who had also separated from Hardy, Sanderman persuaded Felter to act as temporary shop steward and get the employees to sign cards applying for membership in Local 815. During late February, March and early April, Felter went about his solicitation on behalf of the local, with considerable success. Since people were continuously being hired and employees of contractors were also on the premises, Felter occasionally asked Thomson, the Company's personnel manager, to point out who were the new Majestic employees and introduce him. When Felter was talking to the employee,

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Thomson would walk away, or sometimes remain "in the vicinity," though not within hearing distance, in order to be available to point out someone else. Meanwhile four conferences were held between Sanderman, Friedman and Felter for the Union, and Hardy and, on some occasions, Thomasis for the Company. On April 26, a typical collective bargaining agreement, containing a union security clause as authorized by § 8 (a) (3) of the National Labor Relations Act, was executed; it was effective as of February 14, 1963, and was to terminate on December 1, 1965. Prior to the signing of the agreement the Union presented authorization cards signed by 26 of the 37 persons then employed.

On May 22, a representative of the Textile Workers Union met with five Majestic employees and persuaded them to sign membership cards and undertake to get others signed. By May 28, their efforts produced some 34 signed cards out of a force of about 45, and the union filed a petition for election with the National Labor Relations Board. On the same day, stating that it now represented a majority of the employees, the Textile Workers requested that Majestic meet with them to negotiate a collective bargaining agreement. When this demand was rejected on the ground that the Company already had an exclusive agreement with Local 815, the union filed an unfair labor practice charge, alleging that Majestic had entered into a "collusive contract with the Teamsters Union * * * for the express purpose of preventing the workers from picking a bargaining agency of their own choice," and that the agreement was executed "on February 14, 1963, at which time the Company employed approximately 4 people and there was not a single piece of equipment in operation." The complaint, issued by the General Counsel after the filing of a second charge, also alleged that the agreement with Local 815 was executed on or about February 14; it claimed, in addition to specific acts alleged to constitute unlawful assistance to Local 815, that at the time Majestic did not have a representative complement in its employ and that Local 815 was not duly designated by an uncoerced majority.

The Trial Examiner found that the contract was in fact executed on April 26 and that on this date Majestic had employed at least 30% of its ultimate complement and had employees working within at least 50% of the ultimate job categories, thus satisfying the established test for determining the stage at which a binding contract may be signed on behalf of all present and future employees. See General Extrusion Co., 121 N.L.R.B. 1165 (1958). Concluding also that the other charges of unlawful assistance had not been established, he recommended that the complaint be dismissed. The Board, acting through a three-member panel, accepted the Examiner's report in largest part but reached a different ultimate conclusion. It held that the solicitation by Felter constituted unlawful assistance in violation of § 8 (a) (2) since at the time Felter was working "in a lead capacity for the general laborers then being hired" and had received the cooperation of Thomson. It also found unlawful assistance in the very act of negotiating a contract with Local 815 as the exclusive representative of the employees before the union had achieved majority status, even though on the understanding that execution of any agreement depended on the union's having attained that goal. In arriving at this conclusion, which was thought to be a logical or even necessary corollary of International Ladies Garment Workers Union, etc., v. NLRB (Bernhard-Altmann), 366 U.S. 731 , 81 S.Ct. 1603 , 6 L.Ed.2d 762 (1961) , the panel was obliged to overrule the Board's longstanding decision permitting such conditional negotiation, Julius Resnick, Inc., 86 N.L.R.B. 38 (1949), [1] and to override

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the objection that no such issue had been posed by the complaint. Finally, the panel held that since the contract with Local 815 had thus resulted from violations of § 8(a) (2), execution of the agreement unlawfully interfered with employees' rights protected by § 8(a) (1), that it consequently afforded no justification for refusing to bargain with the Textile Workers, and that Majestic had thus violated § 8(a) (5). The order issued by the Board directed the Company, *inter alia,* to cease and desist from giving any effect to the agreement with Local 815 "or to any modification, extension, renewal or supplement thereto" and from refusing to bargain with the Textile Workers as the exclusive representative of the employees; to withdraw recognition from Local 815 unless and until the latter was certified by the Board; and to bargain with the Textile Workers. In a supplemental decision, the panel denied petitions for reconsideration by Majestic and Local 815, which, though not named as a respondent, was a party by virtue of the Board's Rules and Regulations, § 102.8, 29 C.F.R. § 102.8 (1965), see NLRB v. Majestic Weaving Co., 344 F.2d 116 (2 Cir. 1965) , and ordered Majestic to reimburse all employees who by petition had protested the deduction of dues and initiation fees payable to Local 815.

I.

The conclusion that the activities of Felter and Thomson constituted unlawful assistance to Local 815 is not supported by substantial evidence on the record as a whole.

Weyant Felter was a pipefitter and boiler-operator receiving an hourly wage and punching a time clock. He would start the boiler and compressors on coming to work, watch them for an hour or two, and close them down at the end of the day. For the rest of the time he engaged in "pipe work" as directed by supervisors, being assigned such helpers, from one to three or four, as the particular job required. On a very few occasions, when a supervisor knew he would be late in getting to work, Felter would be told to show two or three of the employees what jobs were to be done. Felter was without authority, real or apparent, to hire or fire other employees or to act in any general supervisory capacity on behalf of the Company.

It is true, as counsel for the Board says, that § 8(a) (2) may be violated by organizing activities of an employee in a position of authority for which the employer may fairly be held responsible, even though it has not in fact authorized them and the employee did not have the power to hire or fire, see International Ass'n of Machinists v. NLRB, 311 U.S. 72 , 79-81, 61 S.Ct. 83 , 85 L.Ed. 50 (1940) ; H. J. Heinz Co. v. NLRB, 311 U.S. 514 , 518-521, 61 S.Ct. 320 , 85 L.Ed. 309 (1941) ; NLRB v. Link-Belt Co., 311 U.S. 584 , 598-599, 61 S.Ct. 358 , 85 L.Ed. 368 (1941) . But the reason for this rule, namely, that the rank and file may have just cause to regard such activities as representing the employer's will or desire, NLRB v. Link-Belt Co., supra, also sets its limits. And, in practical application, due weight must also be given to competing values; if senior men "were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent men in the appropriate bargaining group would be eliminated." NLRB v. Arma Corp., 122 F.2d 153 , 156 (2 Cir. 1941).

On the facts of this case no reasonable basis can be found for inferring that the workers would have considered or had just cause to consider Felter's organizing activities to be at the instance of management. The only thing that set Felter

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apart in any way was that he was older than many of the employees and more experienced in pipe work, so that he was the senior man or straw boss when a pipe job had to be done. On the basis of this alone, the employees could not reasonably have thought that Felter was acting for Majestic, see NLRB v. Arma Corp., supra at 156; NLRB v. Newton Co., 236 F.2d 438 , 442 (5 Cir. 1956); cf. NLRB v. Griggs Equipment, Inc., 307 F.2d 275 , 279 (5 Cir.1962), or that the Company would then have interfered with an employee of similar status soliciting on behalf of another

union or arguing against any union at all. See Ballston-Stillwater Knitting Co. v. NLRB, 98 F.2d 758 , 762 (2 Cir. 1938); NLRB v. Newton Co., supra, 236 F.2d at 442 . The employees could hardly have considered it unusual that Local 815 in its effort to organize the plant should have enlisted the help of a senior employee rather than that of a younger man. And once it is recognized that Felter's organizing activities of themselves cannot fairly be attributed to Majestic, the minor help rendered by Thomson, the personnel manager, is not enough to tip the scale and satisfy the General Counsel's burden of proof. His identification of the new employees was a normal courtesy, especially appropriate under circumstances where they were mingled with the employees of contractors; an employer is hardly to be faulted for failure to make life difficult for an employee endeavoring to organize his fellows.

The case for enforcement of the Board's order on this ground is further weakened by the Trial Examiner's conflicting conclusion that Felter, even with Thomson's insignificant assistance, could not be considered to have been acting on behalf of the Company. To be sure, the issue here did not turn on credibility, as to which the weight to be given such a finding by a hearing officer attains its maximum, Universal Camera Corp. v. NLRB, 340 U.S. 474 , 496-497, 71 S.Ct. 456 , 95 L.Ed. 456 (1951) , but on the inference reasonably to be drawn from conduct not in serious dispute. Yet, on such an issue also, observation of the witnesses is likely to give a more accurate feel than reading a cold record; something would depend on what manner of man Felter was, and whether the testimony as to Thomson's activities carried true conviction. The Trial Examiner had "lived with the case" — an opportunity not vouchsafed to the Board, and his conflicting report carries some weight against the existence of substantial evidence to support the Board's conclusion. See Universal Camera Corp. v. NLRB, supra at 492-497, 71 S.Ct. 456 .

II.

Having rejected the finding that Felter's organizing activities constituted unlawful assistance, we turn to the other basis for decision — that negotiation with a minority union of an agreement purporting to bind all employees, although conditioned on the union's achieving majority status before execution, was itself a violation of §§ 8(a) (1) and (2). We can begin by narrowing the area of debate. The Board no longer maintains that its overruling of the long-standing Resnick decision permitting such conditional negotiation, see fn. 1, was compelled by the Supreme Court's holding that the execution of an agreement recognizing as exclusive bargaining representative a minority union, mistakenly believed to represent a majority, is an unfair labor practice under §§ 8(a) (1) and (2). International Ladies Garment Workers Union, etc. v. NLRB (Bernhard-Altmann), 366 U.S. 731 , 81 S.Ct. 1603 (1961) . Its position is rather, as it has stated elsewhere, that "the premature grant of exclusive bargaining status to a union," even if conditioned on attainment of a majority before execution of a contract, is similar to formal recognition "with respect to the deleterious effect upon employee rights." 29 NLRB Ann. Rep. 69 (1964).

On our part, we would entertain no difficulty if the Board, after appropriate proceedings, should fashion for prospective application a principle along the general lines of that adopted here; rational basis plainly exists for some such

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specification of the language of § 8(a) (2) even in cases like this where no other union was on the scene when the negotiations occurred. The problem arises from the Board's attempt to achieve its desire by a shorter road and in a more summary fashion.

There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., 332 U.S. 194 , 202, 67 S.Ct. 1575 1580, 91 L.Ed. 1995 (1947) , [2] that since an administrative agency has "the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason than a court to rely upon *ad hoc* adjudication to formulate new standards of conduct," and that the "function of filling in the interstices" of regulatory statutes "should be performed, as much as

possible, through this quasi-legislative promulgation of rules to be applied in the future." See, e. g., NLRB v. A. P. W. Prods. Co., 316 F.2d 899 , 905 (2 Cir. 1963); Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 345 F.2d 264 , 269 (2 Cir. 1965) (concurring opinion); International Union of Operating Eng'rs, Local 49, etc. v. NLRB, 353 F.2d 852 (D.C.Cir. 1965) . [3] Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer previously left without, see NLRB v. Pease Oil Co., 279 F.2d 135 , 137-139 (2 Cir. 1960), or shortens the period in which a collective bargaining agreement may bar a new election, see Leedom v. International Bhd. of Elec. Workers, 107 U.S. App.D.C. 357 , 278 F.2d 237 , 243 (1960), or imposes a more severe remedy for conduct already prohibited, see NLRB v. A. P. W. Prods. Co., supra. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established. See NLRB v. International Bhd. of Teamsters, 225 F.2d 343 (8 Cir. 1955) ; NLRB v. E & B Brewing Co., 276 F.2d 594 , 600 (6 Cir. 1960), cert. denied, 366 U.S. 908 , 81 S.Ct. 1083 , 6 L.Ed.2d 234 (1961) .

It must be recognized that "every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency," and that, generally speaking, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency," SEC v. Chenery Corp., supra, 332 U.S. at 203 , 67 S.Ct. at 1580 . But the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates. As a result of the nature of the task Congress has confided to the agencies and the vagueness of the directions it has given, they are, and ought to be, much likelier to engage both in new departures and in alterations than courts with their more limited "molecular motions," Southern Pac. Co. v. Jensen, 244 U.S. 205 , 221, 37 S.Ct. 524 , 61 L.Ed. 1086 (1917) (dissenting opinion of Mr. Justice Holmes);

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and this makes it peculiarly important for them to take full advantage of their power to act prospectively, whether by rule-making or adjudication. In this case, we might well conclude that where for fifteen years the Board considered conditional negotiation consistent with the statutory design "the ill effect of the retroactive application of a new standard" so far outweighs any demonstrated need for immediate application to past conduct, SEC v. Chenery Corp., supra, 332 U.S. at 203 , 67 S.Ct. at 1581 , as to render the action "arbitrary." APA § 10(e), 5 U.S.C. § 1009(e). However, we do not need to decide that serious substantive issue, since we deny enforcement on a procedural ground.

The complaint issued by the General Counsel gave no notice that the mere fact of negotiation with Local 815 was claimed to constitute unlawful assistance. It charged, in addition to the specific acts of Felter, Thomson and others, only that Majestic and Local 815 had executed a collective bargaining contract on or about February 14, 1963, although Majestic "did not have a representative complement of employees in its employ at the time of such execution, and notwithstanding the fact that Local 815 was not at the time of the execution thereof, nor at any time herein material, duly designated or selected as their collective bargaining representative by an uncoerced majority of the employees covered by such agreement." The complaint cannot fairly be read as tendering the issue that the union lacked majority status at the time of negotiation, with consequent illegal assistance even though majority status had been achieved by the time of execution. Indeed, the Board does not assert that it can be. Admitting that the point was first raised in General Counsel's brief to the Trial Examiner, after the hearing had demonstrated that the agreement was not signed until April 26 when Local 815 had authorizations satisfying the Board's standards, the Board insists that no prejudice has been shown since Majestic failed to request an opportunity to offer further evidence then or later, and

indeed could not have presented any which would affect the application of what is considered a *per se* rule to allegedly undisputed facts.

We do not find the argument persuasive. Section 5 of the APA, 5 U.S.C. § 1004, provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (a) Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted." In commendable conformity with this mandate and with the National Labor Relations Act § 10(b), the Board's Rules and Regulations § 102.15, 29 C.F.R. § 102.15 (1965), require a complaint to contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." See Douds v. International Longshoremen's Ass'n, 241 F.2d 278 , 283 (2 Cir. 1957). As this recognizes, the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in what the Board calls "General Counsel's post-complaint theory of the case" unveiled in a post-hearing brief.

Where an agency determination is made under the latter circumstances and goes beyond the issues framed by the complaint, a serious question must arise whether a respondent has not been denied a full and fair hearing on the unlawful conduct with which it has been charged. See NLRB v. Bradley Washfountain Co., 192 F.2d 144 , 149 (7 Cir. 1951); Douds v. International Longshoremen's Ass'n, supra, 241 F.2d at 283-284 ; NLRB v. E & B Brewing Co., 276 F.2d 594 , 598-599 (6 Cir. 1960), cert. denied, 366 U.S. 908 , 81 S.Ct. 1083 (1961) ; Northeastern Indiana Bldg. & Constr. Trades Council v. NLRB, 352 F.2d 696 (D.C.Cir. 1965) . In this case, because the focus of the hearing was on the date of execution of the collective bargaining

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agreement and the union's representative status at that time, the evidence concerning the negotiations was at most incidental. The record does not disclose when Local 815 achieved a majority status conforming with the Board's standards or that negotiation on the basis of its being the exclusive representative antedated its attaining that position. The Company thus had no opportunity to show at the hearing that it had not violated even the new rule later announced. See NLRB v. H. E. Fletcher Co., 298 F.2d 594 , 600 (1 Cir. 1962). [4]

The vice arising from the lack of notice and proper hearing is not to be overcome by insistence that Majestic should have sought leave to introduce further evidence. When the new issue was raised after the hearing, the burden of seeking a reopening rested on the General Counsel who sought to raise the new issue, not on Majestic; at that stage the Company was entitled to stand on the Resnick decision, as it did with success before the Trial Examiner, and also on its procedural rights. After the Board had announced its new rule, Majestic made sufficient objection by urging in its petition for reconsideration that the facts underlying the decision had not been fully litigated; and it was justified in adhering to its legal position without diluting its substantive and procedural arguments by asking for a new hearing which would in effect have represented consent to belated amendment of the complaint. At least under the circumstances of this case, where the Board has admittedly altered its standard of required conduct in response to a post-hearing brief, it suffices that Majestic can direct the attention of a reviewing court to evidence it might have been able to offer in answer to a proper complaint. [5]

The Board urges that, on this view of the case, we should remand rather than deny enforcement. Assuming that the apparent bar arising from the provision in § 10(b) which permits amendment of a complaint only "at any time prior to the issuance of an order based thereon," could be surmounted by our vacating the order, we see no good reason to permit the Board to start afresh. The alleged unfair labor practice is nearly three years old, the offending contract with Local 815 has already expired, and we assume that only the pendency of this proceeding prevents a new election. [6]

Enforcement denied.

Notes:

1 The Board there stated:

Furthermore, while there are indications that the Respondent and the Independent may have agreed to the terms of their contract before the Independent had organized the Respondent's employees, and the Respondent did in fact act precipitately in signing the contract in the face of A. F. of L. objections and charges, the Respondent's action did not constitute a violation of the Act, because the Independent represented a majority of the Respondent's employees when the contract was executed on March 3, 1948. 86 N.L.R.B. at 39.

2 Although this was specifically addressed to the SEC with respect to the Public Utility Holding Company Act, we see no reason for doubting it was intended to have general applicability.

3 See also Professor Peck's illuminating article, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 145-47 (1962); and 1 Davis, Administrative Law Treatise § 6.13, at 147-50 (1965 pocket part).

4 We also think it highly undesirable for an agency to announce a new *per se* rule without *either* a rule-making *or* an evidentiary hearing, thereby denying itself the light on the proper content of the rule which such proceedings would afford. We cannot tell, for example, how far the new rule depends on knowledge of the negotiation by the employees, or whether a full disclosure of the condition to them would save the situation. A hearing would have focused attention on whether these elements ought not to be included, either as a matter of policy or to overcome possible doubt whether their absence might not render the rule invalid. Of course, if either or both of these elements should ultimately become components of the new rule, the lack of a proper hearing would be even more consequential than we have intimated.

5 NLRB v. E & B Brewing Co., 276 F.2d 594 , 598-599 (6 Cir. 1960), cert. denied, 366 U.S. 908 , 81 S.Ct. 1083 (1961) , would indicate that not even that is required. We do not read NLRB v. Bradley Washfountain Co., 192 F.2d 144 , 149-150 (7 Cir. 1951); NLRB v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941 , 947-948 (1 Cir. 1951), or other decisions cited by the Board, as ruling otherwise. We consider the instant case more nearly analogous to NLRB v. H. E. Fletcher Co., 298 F.2d 594 (1 Cir. 1962) , and NLRB v. Johnson, 322 F.2d 216 (6 Cir. 1963) , cert. denied, 376 U.S. 951 , 84 S.Ct. 968 , 11 L.Ed.2d 971 (1964) .

6 Decisions that when an employer has been proved to have unlawfully undermined a union entitled to recognition, a court may not condition enforcement of a valid Board order requiring recognition on a new election, see NLRB v. Katz, 369 U.S. 736 , 748 n. 16, 82 S.Ct. 1107 , 8 L.Ed.2d 230 (1962) , and cases there cited, differ *toto caelo.*

EXHIBIT 44

FCC 95-185

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
The NYNEX Telephone Companies	)
Petition for Waiver	)
	)
Transition Plan to Preserve Universal	)
Service in a Competitive Environment	)

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1995 Released: May 4, 1995

By the Commission: Commissioners Barrett, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. NYNEX requests a waiver of Parts 61 and 69 of the Commission's rules to permit it to use different methods for assessing certain categories of access charges prescribed by our rules. NYNEX claims that, in light of the development of competition in the provision of telecommunications services in the NYNEX region, the compensation methods prescribed by our rules unfairly disadvantage NYNEX and produce uneconomic results. Specifically, NYNEX claims that certain access charges contain subsidy components that result in rates in excess of the relevant costs, and that such pricing cannot be sustained in a competitive environment. Although NYNEX favors a comprehensive reform of the access charge and jurisdictional separations rules, it claims that the existing rules impose special hardships upon NYNEX because market conditions in its region differ from conditions in other parts of the country. Therefore, it argues that it needs interim relief from the requirements of the current rules while the Commission explores more comprehensive reform.

2. As described below, pursuant to Section 1.3 of our Rules,[1] we grant NYNEX's request in part. We conclude, based on this record, that competitive developments in LATA 132,[2] which comprises the New York City metropolitan area, justifies granting a limited waiver in that area. In so doing, we recognize that, among other factors, regulatory changes by this Commission and the New York Public Service Commission (NYPSC) and steps NYNEX has taken create an environment that is open to competitive entry in exchange and access services in the New York City metropolitan area and that competitive providers are beginning to offer services in competition with NYNEX in the area. Certain aspects of our access charge rules are likely not to operate in the public interest in the New York City metropolitan area in light of these circumstances. Within the New York City metropolitan area, we grant NYNEX a limited waiver regarding two access charge elements. Based on the current record, we decline to waive our rules with respect to LATA 132 to the further extent originally sought by NYNEX, or to grant any waiver for the remainder of NYNEX's service area, because we are unable to conclude that granting such relief would serve the public interest.

II. BACKGROUND

3. NYNEX provides local exchange telephone services in New York and New England. NYNEX and other local exchange carriers (LECs) also originate and terminate long-distance services provided by interexchange carriers (IXCs). The origination or termination of long-distance or interexchange services is commonly known as access service. NYNEX provides access for IXCs in New York and New England. The provision of interstate access service by LECs is regulated by this Commission.

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[1] 47 C.F.R. § 1.3.

[2] Local Access and Transport Area (LATA) 132 is defined and described in more detail below. See infra ¶ 25 & n.48.

4. This Commission promulgated rules in the early 1980s to establish a system of tariffed charges for interstate access services provided by LECs. Most of those tariffed access charges are billed to IXCs. The access charge rules, which are found in Part 69 of this Commission's Rules, 47 C.F.R. Part 69, govern the rate structure and pricing of interstate access.

5. Charges for the origination or termination of interexchange services that use switching in the local or end office switch are known as switched access charges. Other access charges are described as special access charges. For the switched access services, the Part 69 rules prescribe the elements that must be used in the access tariffs, as well as the method for assessing charges for each switched access element. The NYNEX waiver request would affect three of the major switched access components: (1) the common line element; (2) the local switching element; and (3) the transport interconnection charge.

6. The Part 69 access charge rules use the term "common line" to describe the connection between the premises of a subscriber to local exchange telephone service and the local or end office switch of the LEC that is used in common for local exchange service and some interstate and intrastate interexchange services. That connection can also be described as a "subscriber line" or "local loop." Interstate common line costs are recovered through a combination of flat monthly per-line charges billed to end users and per-minute charges billed to IXCs. The per-line charge, often known as the subscriber line charge (SLC), is described as an end user common line charge in the Part 69 rules. The per-minute charge to the IXCs, which is based on "access minutes" or interstate minutes of use,[3] is described as the carrier common line charge (CCL).

7. The Part 69 access charge rules impose a cap of $3.50 per line upon the monthly subscriber line charge to residential customers and business customers who subscribe to one local exchange service line.[4] Business customers that subscribe to two or more lines, sometimes referred to as multi-line business customers, are subject to a subscriber line charge that cannot exceed $6 per line.[5]

8. The Part 69 access charge rules originally required pooling of common line costs and revenues by all LECs, under which LECs contributed revenues to a "pooled" fund or withdrew revenues from that fund, in order to reach nationally averaged common line charges. That mandatory pooling arrangement was subsequently replaced by a system permitting exchange carriers to leave the pool and set their common line rates based on their own common line costs. Under this new system, however, the Commission required NYNEX, and other LECs leaving the common line pool, to collect amounts in their carrier common line charges to be contributed

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[3] 47 C.F.R. § 69.2(a).

[4] See 47 C.F.R. § 203(a).

[5] See 47 C.F.R. § 104(d).

through the National Exchange Carrier Association to enable higher cost LECs to maintain common line rates that would be comparable to a pooled rate.[6] Those contributions are described as long-term support payments. Thus, NYNEX's carrier common line rate recovers both a portion of its own interstate common line costs and its long-term support obligations.

9. The second access element at issue here is the local switching element. Part 69 access charge rules establish a local switching element in the access service tariffs that recovers costs of local or end office switching that are allocated to interstate services pursuant to the jurisdictional separations rules.[7] The rules require LECs to levy local switching charges on IXCs on a per-minute basis.

10. The final access charge that is the subject of NYNEX's petition is the transport interconnection charge. The transport charges in access service tariffs recover interstate costs of transmission and tandem switching between end office switches and IXC points of presence. Historically, transport charges were recovered on a per-minute basis, even though many transport facilities are dedicated to the use of individual IXCs. In 1992, the Commission decided to restructure transport rates to make them more economically rational, including flat rates per trunk to recover the non-traffic sensitive cost of certain dedicated transport facilities, and to price most transport services based on the pre-existing rates for comparable special access services.[8] The restructured transport rate elements created in this manner recovered much less revenue than the historic per-minute transport charges. Thus, the Commission created the transport interconnection charge, initially priced on a residual basis, so that, when initially implemented, the transport rate restructure per se would not change the amount of revenues recovered by the LECs for transport services, i.e., the restructure was intended to be revenue-neutral to the LECs. The per-minute transport interconnection charge applies to all access minutes of traffic using the LEC switched access network, including traffic passing over LEC transport facilities as well as traffic passing over competitive access providers' transport facilities and interconnected with the LEC switched access network.

11. The price cap rules in Part 61 of the Commission's Rules give LECs that are subject to price caps some flexibility in establishing some of the access charges.[9] The price cap rules do not, however, change the prescribed access elements. The rules do split interstate services, including access elements, into discrete groups called baskets. For each basket of access services, price cap carriers can establish charges that do not exceed an index value for that

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[6] See 47 C.F.R. §§ 69.603(e), 69.612.

[7] See 47 C.F.R. § 69.106.

[8] See Transport Rate Structure and Pricing, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030 (1994), for a more detailed explanation of the transport rate restructure.

[9] See 47 C.F.R. §§ 61.41-61.43, 61.45-61.47

basket. Price cap carriers have some flexibility in establishing the amount of charges for elements or services that are included in the same basket, as long as the actual price index for the basket does not exceed the price cap index for that basket. Services in a basket may, however, be split into service categories. Pricing flexibility is limited by banding rules that establish separate upper and lower pricing bands for each service category within a basket.[10] Local switching and the transport interconnection charge are classified as service categories in the traffic sensitive and trunking baskets, respectively.[11] Unlike most other service categories, the transport interconnection charge service category is subject to an upward band of 0 percent relative to the overall price cap index, and has no downward pricing limit.[12]

12. Our access charge rules require that the carrier common line, local switching, and transport interconnection charges, as well as most other access charges, be uniform throughout each of a LEC's study areas. A study area generally comprises all of a LEC's service area within a particular state.[13] The access charge rules originally prohibited any deaveraging of access charges within a study area.[14] The Special Access Expanded Interconnection Order authorized LECs to establish a system of traffic density-related rate zones within a study area, with different special access rates in each zone.[15] The Commission subsequently authorized LECs to use the same zones for purposes of establishing divergent rates in different zones for some transport charges, but not the transport interconnection charge.[16] LEC central offices in areas with the highest traffic densities were assigned to Zone 1; offices in areas with intermediate degrees of density were assigned to Zone 2; and offices in areas with the lowest density were assigned to Zone 3.

III. NYNEX'S PETITION

13. On December 15, 1993, NYNEX filed a petition for waiver of Parts 61 and 69 of the Commission's rules to enable NYNEX to implement a plan that NYNEX refers to as the

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[10] See 47 C.F.R. § 61.47(e), (g), & (h).

[11] See 47 C.F.R. § 61.42(e)(1)(ii); 6.42(e)(2)(vi).

[12] See 47 C.F.R. § 61.47(g)(3).

[13] See Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7452 n.403 (1992) (Special Access Expanded Interconnection Order).

[14] See 47 C.F.R. § 69.3(e)(6).

[15] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454-56.

[16] Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 (1993) (Transport Expanded Interconnection Order).

Universal Service Preservation Plan (or "USPP"). Under the plan, NYNEX would reduce or eliminate certain charges that are assessed to IXCs on a per-minute basis, and would recover most of the revenues yielded by these rate reductions through other charges assessed to IXCs. NYNEX proposes different combinations of charges for the three different zones within the NYNEX region.

14. NYNEX maintains that special circumstances in the NYNEX region justify a waiver of the applicable access charge and price cap rules to permit NYNEX to implement its plan to realign rates for access services. NYNEX contends that various federal or state regulatory requirements have forced NYNEX to price some services above costs and to price other services below costs; that many of the resulting subsidies are reflected in switched access charges that exceed costs; and that this system of subsidies can only work in a monopoly environment.[17] Although NYNEX believes that these problems could be solved through a comprehensive rulemaking proceeding, NYNEX says the Commission should grant a waiver to provide interim relief from some subsidy burdens in the NYNEX region because NYNEX has an "acute need" for such relief and "cannot wait for a long term solution to the subsidy and contribution problems."[18] NYNEX says the existing subsidies create greater and more urgent problems in the NYNEX region because the NYNEX region contains the highest concentration of high-volume, low-cost business markets that are most affected by switched access pricing and because competition from other access providers is more advanced within the NYNEX region. NYNEX notes that the first competitive access network in the country was introduced in New York City in 1985,[19] the two largest competitive access providers derive half of their revenues from the NYNEX region,[20] the NYPSC has required NYNEX to allow competitive access providers to connect loops to NYNEX switches,[21] and that Commission has granted 18 companies certificates to operate as local telephone companies in NYNEX territory.[22]

15. First, NYNEX proposes to recover the portion of carrier common line revenues attributable to long-term support payments to other LECs through a charge assessed to each IXC based on the IXC's share of nationwide interstate revenues.[23] NYNEX describes the proposed charge for long-term support as a "bulk billing" charge. NYNEX uses the term "bulk billing"

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[17] NYNEX Petition at 1-3.

[18] Id. at 3.

[19] NYNEX Petition at 17.

[20] Id.

[21] Id. at 19.

[22] Id. at 20.

[23] NYNEX Petition Ex. 11 at 2-3.

to describe an assessment formula that is not based upon facilities or services actually used in a particular billing period.

16. Second, NYNEX proposes to recover the remainder of the carrier common line revenues (which recover NYNEX's own interstate common line costs) attributable to multi-line business customers through a charge assessed to IXCs based on the number of lines in the NYNEX region presubscribed to each respective IXC.[24] NYNEX originally proposed to adjust these per-presubscribed line charges by a weighting formula to reflect revenues of IXCs.[25] That weighting formula was designed to reduce the burden imposed upon IXCs (such as AT&T) that have a relatively large number of low-volume presubscribed customers. In its reply comments, NYNEX modified its plan to eliminate this weighting formula.[26] NYNEX also proposes an adjustment to attribute presubscribed lines to its own limited interstate toll operations.[27]

17. Third, NYNEX proposes to reduce the per-minute local switching charge for all zones and all users. NYNEX contends that, while the Commission's rules treat local switching costs as traffic sensitive (i.e., the costs vary in proportion to the amount of usage) and require LECs to levy local switching charges on a per-minute basis, a portion of NYNEX local switching costs are actually non-traffic sensitive (i.e., the costs do not vary with usage). NYNEX, relying upon its own cost study to determine the non-traffic sensitive portion of the local switching costs, proposes to recover those non-traffic sensitive costs through a charge per presubscribed line.[28] NYNEX originally proposed that this charge would be weighted in the same manner as the per-presubscribed line charge to recover carrier common line revenue.[29] In its reply, NYNEX submitted a plan, as discussed more fully in paragraph 19, that assessed the per presubscribed line charge on IXCs without applying a weighting factor.

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[24] The AT&T antitrust consent decree required divested Bell Operating Companies to establish a system that permits local exchange service subscribers to access a designated interexchange carrier without using access codes. United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd, Maryland v. United States, 460 U.S. 1001 (1993). That process is described as presubscription.

[25] NYNEX Petition Ex. 11 at 10-12.

[26] NYNEX Reply App. 10 at 5.

[27] NYNEX Reply App. 10 at 6. The AT&T antitrust consent decree permits NYNEX to provide some services that are classified as interexchange or interLATA for purposes of that decree between some points in New York and New Jersey. Those services are commonly known as corridor services. Commission rules require NYNEX to pay access charges to itself when NYNEX provides interstate interexchange services.

[28] NYNEX Petition Ex. 11 at 3, 8-9.

[29] NYNEX Petition Ex. 11 at 10.

18. Fourth, NYNEX proposes to deaverage the transport interconnection charge and apply different charges to minutes attributable to different categories of end-users and to different geographic zones. NYNEX proposes to reduce the transport interconnection charge for access minutes attributable to Zone 1 business customers with multiple lines by $52 million. That reduction was designed to reduce total per-minute interstate switched access charges for those Zone 1 business users to 2 cents per access minute. NYNEX proposes to absorb about $25 million of reduced transport interconnection charge revenues, and to recover the remaining $27 million of reduced transport interconnection charge revenues through a per-presubscribed line charge.[30]

19. In its reply comments, NYNEX presented an alternative plan for recovering revenues from local switching and the transport interconnection charge that would no longer be recovered through per-minute access charges. NYNEX described an alternative bulk billing approach similar to that used to recover revenue attributable to long-term support payments in its original plan and proposed to apply that approach to local switching and transport interconnection charges as well.[31] NYNEX designated this as a minute of use or "MOU" plan. The alternative plan adopted a different form of bulk billing based upon interstate toll minutes that IXCs originate or terminate in the NYNEX region, rather than basing it on each IXC's nationwide share of interstate revenues, as NYNEX originally had proposed for long-term support recovery. The IXCs would report toll minutes to an independent organization. That organization would compute toll minute market shares annually and report confidential results to NYNEX for billing purposes only.[32] NYNEX would bill the IXCs monthly.[33] Toll minutes attributable to facilities of other access providers and to special access facilities supplied by NYNEX would be included in the assessment formula.

20. Finally, NYNEX proposes to modify the structure of the price cap service categories applicable to the local switching and transport interconnection charges. NYNEX proposes to create two new separate service subcategories within the local switching category for the per-line and per-minute local switching charges that it proposes to create. For the per-line service subcategory, NYNEX proposes an upper pricing band of 0 percent relative to the price cap index and a -5 percent lower pricing band.[34] In addition, NYNEX proposes to create three new service subcategories within the transport interconnection charge service category: the new per-line charge; the per-minute charge for usage attributable to residential and single-line business

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[30] NYNEX Petition Ex. 11 at 3.

[31] NYNEX Reply App. 10 at 2.

[32] NYNEX Reply App. 10 at 6.

[33] NYNEX Reply App. 10 at 2.

[34] NYNEX Petition Ex. 12 at 3.

lines; and the per-minute charge for usage attributable to business customers with multiple lines.[35] NYNEX also proposes to create separate zone subcategories in each zone used for density zone pricing purposes for the single-line and multi-line transport interconnection charge.[36]

IV. OVERVIEW OF THE PARTIES' POSITIONS

21. The pleadings filed in response to the NYNEX waiver petition do not dispute the NYNEX view that existing rules should be revised to reduce or eliminate some subsidy components. Several LECs support the waiver request and advocate granting interim relief to other LECs that request it.[37] Ad Hoc and ALTS contend that it would be unwise to grant any interim waivers because granting interim waivers will undermine efforts to achieve a more comprehensive access reform.[38]

22. A number of parties oppose the NYNEX waiver request, contending that it does not satisfy applicable criteria for waivers of agency rules established in prior court decisions.[39] Some contend that a petition for waiver must demonstrate circumstances that are unique in kind and NYNEX does not claim that its circumstances are unique in kind.[40] According to these parties, other LECs are or will be confronting the same types of problems that NYNEX describes. Others claim that NYNEX has not demonstrated special circumstances in the NYNEX region that are unique in degree or kind because NYNEX has not demonstrated that NYNEX needs interim relief in order to respond to switched access competition.[41] Some comments contend that alternative cost recovery guidelines that this Commission adopted in 1986 are applicable to this waiver request and that the NYNEX request does not satisfy some of those guidelines.[42]

23. An array of IXCs, as well as MFS, object to the specific cost recovery methods proposed by NYNEX, and claim that implementing such cost recovery methods in a particular

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[35] NYNEX Petition Ex. 12 at 4.

[36] Id.

[37] Ameritech Comments at 2; Bell Atlantic Comments at 3; GTE Comments at 6; Southwestern Bell Comments at 2.

[38] Ad Hoc Opposition at 8; ALTS Opposition at 10.

[39] Ad Hoc Opposition at 7; MCI Opposition at 5; Time Warner Comments at 5-7.

[40] E.g., Ad Hoc Opposition at 7.

[41] AT&T Comments at 5-10; CompTel Comments at 3; Locate Comments at 2; MCI Opposition at 5-6; MFS Comments at 6-7; Teleport Comments at 1, 3-9.

[42] See ALTS Opposition at 6-10.

zone or region will produce anomalous results that will distort competition in interexchange markets by changing relative access costs of IXCs in an unfair manner.[43] Some parties contend that the plan is likely to produce adverse effects for some end user customers.[44] ALTS, EMI, and MCI contend that the plan would produce unreasonable discrimination between business customers with multiple lines and other customers and between customers in different zones.[45]

V. DISCUSSION

A. Overview

24. Under Section 1.3 of our rules, we are authorized to grant waivers "if good cause therefor is shown."[46] As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[47]

25. We conclude that NYNEX has shown that a number of interrelated regulatory and economic developments specifically applicable to the local access and transport area (LATA) that includes New York City and the surrounding metropolitan area, known as "LATA 132,"[48] create special circumstances justifying a limited waiver of the Commission's access charge rules for that area. First, the state regulatory commission and NYNEX have taken a number of steps, not to date taken in other parts of the country, that remove significant barriers to the growth of competition in the access and exchange markets. Second, competitive service providers are active to a greater extent in the New York City metropolitan area than is generally the case in other areas of the country, and are offering alternative sources of supply for many switched local telecommunications services within much of the LATA. In addition, given the removal of significant barriers to entry in New York and the particularly high concentration of high-volume toll users in the New York City area, the potential for additional entry by competitive providers

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[43] AT&T Comments at 15-17; CompTel Comments at 8; RCI Comments at 9-10; EMI Comments at 3, 10; MFS Comments at 18-19.

[44] Ad Hoc Opposition at 2,5; AT&T Comments at 18; ALTS Opposition at 8-9.

[45] ALTS Opposition at 9; EMI Comments at 9; MCI Comments at 9.

[46] 47 C.F.R. §1.3.

[47] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[48] LATA 132 includes New York City; Nassau and Suffolk Counties on Long Island; and Westchester, Rockland, and Putnam Counties north of New York City, as well as small portions of several nearby counties. LATAs are local areas within which Bell operating companies were permitted to provide service under the consent decree that broke up the Bell System. See United States v. AT&T, 569 F. Supp. 990 (D. D.C. 1983).

is especially high in that area. These factors, which are discussed extensively in the special circumstances section below, generally distinguish the economic conditions existing in the New York City metropolitan area from other areas in NYNEX's region and the remainder of the country. In light of these special circumstances, we conclude that the grant of a limited waiver of certain access charge rules, as set forth below, will better serve the public interest than would rigid adherence to the current rules.

26. We adopted the access charge rules in the early 1980s, when the LECs were the only providers of local exchange telephone service in their respective market areas, and exercised monopoly power in the provision of interstate switched access service. The access charge rules contain certain provisions, such as the carrier common line charge and the transport interconnection charge, that the Commission found served public policy goals, but whose structure reflected the monopoly environment of that time. Certain of the rules result in access rates that do not reflect the nature of the costs recovered by the particular rate element, and thus provide inaccurate price signals that skew incentives regarding the production and consumption of telecommunications services. Nonetheless, in a monopoly environment, we concluded that these disadvantages were outweighed by various policy benefits such as minimizing flat charges paid by end users. In the increasingly competitive, highly concentrated telecommunications market in the New York City metropolitan area, the balance among divergent public interest goals may shift, and the Commission may need to address that balance in individual cases as changing conditions emerge in different areas of the country. We conclude that marketplace distortions created in LATA 132 by certain of our rules outweigh the benefits that those rules were intended to foster in the first place. The specified rules create incentives for shifting traffic from NYNEX's switched network to potentially less efficient competitors, and may stimulate unproductive investment. Moreover, given the increasingly competitive environment in LATA 132, the rules do not advance our universal service goals in the manner we originally intended. In these circumstances, we find that a limited waiver of these rules in LATA 132 would better serve the public interest.

27. For example, our access charge rules require LECs to recover a substantial portion of their common line costs from IXCs through per-minute carrier common line charges, even though LECs incur these costs in a non-traffic sensitive manner based on the number of subscriber lines provided, not on the number of minutes. The purpose of the carrier common line charge when it was adopted in the early 1980s was to advance universal service by reducing the need for high flat-rate subscriber line charges to end-users.[49] This cost recovery structure was possible in a monopoly environment, in which IXCs have no alternative to the LEC for originating and terminating interstate calls. In an environment in which multiple providers can compete to offer switched interstate access, however, IXCs (and their end-user customers) can shift to alternative carriers and avoid paying NYNEX rates that recover non-traffic sensitive common line costs, resulting in several consequences that are not in the public interest. Because

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[49] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 266-67, 278-81 (1983).

of the concentration of high-volume toll users and the reduced barriers to entry in LATA 132, the rule may stimulate entry by providers that may face higher costs to provide service than NYNEX, but can nonetheless offer service at lower rates because of the absence of this burden. The rule may also result in NYNEX raising the carrier common line rates for its remaining customers, which in turn, may increase long-distance rates and exacerbate the problem of stimulating uneconomic entry. Thus, in the increasingly competitive environment of LATA 132, the carrier common line charge, as provided in our rules, does not advance our universal service goals in the manner we expected in 1984.

28. Similarly, our access charge rules provide for a transport interconnection charge, which recovers revenues that had been recovered in the LECs' interstate switched transport rates since the access charges were established, but that would not be recovered in those rates if transport facilities were priced based on cost. The transport interconnection charge was established during our 1992 restructure of the LECs' interstate switched transport rates to serve the public policy goal of facilitating a rate restructure that initially would be revenue-neutral to the LECs. The charge may be stable in an environment in which IXCs have no alternative to LEC-provided local switching and loop services for interstate switched access. The per-minute transport interconnection charge artificially creates incentives encouraging IXCs and their customers to seek alternative sources of supply for interstate switched access, however, and, under the more competitive conditions of the New York City metropolitan area, may stimulate entry by providers with higher costs of providing service than NYNEX that can still offer service at lower rates because of the absence of this non-cost-based charge.

29. We believe that the limited waiver of our access charge rules described below will better serve our public interest goals -- fostering vigorous and economically efficient competition, preventing unreasonable discrimination, and preserving universal service -- than application of those rules. In contrast, strict adherence to our current rules will serve only to hobble NYNEX, encourage entry by potentially inefficient competitors, and threaten NYNEX's ability to recover its common line costs, with no apparent corresponding public interest benefits. In the face of the special competitive circumstances that exist in LATA 132, we believe the public interest would not be served by delaying action on the waiver until completion of a generic proceeding, because during such delay NYNEX would be unable to stanch the loss of common line cost recovery and other revenues attributable to our access pricing rules. Moreover, in light of the special circumstances in LATA 132 described above and the volume of traffic generated in LATA 132, the grant of a limited waiver, as described in Section D below, should help ensure that further investment decisions by NYNEX and competing providers in LATA 132 reflect more efficient pricing. In the increasingly competitive environment found in LATA 132, this limited waiver should facilitate interstate access pricing by NYNEX that more closely reflects its actual costs of service, thus creating more accurate incentives for shaping the investment decisions of competing telecommunications providers. This, in turn, should ensure more efficient allocation of resources.[50] Therefore, we conclude that a limited

[50] This point is explained in greater detail infra, ¶¶ 43-44.

waiver of certain of our access charge rules is justified at this time to permit NYNEX to exercise greater flexibility in reducing its transport interconnection charges and to recover some of its common line costs in a manner different from that prescribed by our rules.

B. Legal Standard for Granting a Waiver

30. Positions of the Parties. Some opponents of the NYNEX petition argue that this Commission cannot lawfully grant the waiver that NYNEX requested, and some argue that it would be inexpedient to use a waiver to solve the problems NYNEX has described.[51] Some contend that this Commission cannot grant a waiver of a rule even if the petitioner demonstrates that a rule imposes a special hardship upon the petitioner if circumstances indicate that the rule imposes the same kind of hardship on others,[52] even though to a lesser degree. Ad Hoc says that the petition should be denied because NYNEX does not claim its problems are unique except in degree.[53] Some oppositions or comments that contend that waiver requests must be based upon a hardship that is unique in kind quote a statement in the first WAIT Radio opinion that the "essence of a waiver is the assumed validity of the general rule"[54] as support for that view.

31. Analysis. We disagree with the contention raised by certain commenters that we can only grant waivers to relieve special hardships that are unique in kind. WAIT Radio did not reach such a holding. The "essence of waiver" statement appears in the context of a discussion of the possibility that the Commission denied the waiver because the petitioner in the WAIT Radio case did not attack the general rule.[55] The observation that a waiver petition does not have to demonstrate that a rule is invalid in most cases is not a holding that a waiver petition must demonstrate circumstances that are unique in kind. Special circumstances that are unique in degree may justify a waiver if the waiver will serve the public interest. None of the intervening Court or Commission decisions cited in the pleadings hold, or even suggest, that a waiver must be based upon special hardship that is unique in kind.[56]

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[51] Ad Hoc Opposition at 2,7; ALTS Opposition at 4-6; Time Warner Comments at 2, 5-7.

[52] Ad Hoc Opposition at 7; MCI Opposition at 5; Time Warner Comments at 5-7.

[53] Ad Hoc Opposition at 7.

[54] WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969), quoted in MCI Opposition at 5 and Time Warner Comments at 5 n.12.

[55] The Court of Appeals remanded that proceeding to the Commission for further explanation of the decision to deny the waiver request. The Commission subsequently reaffirmed the denial of the waiver and the Court of Appeals affirmed that remand decision. WAIT Radio v. FCC, 459 F.2d 1203 (D.C. Cir.), cert. denied, 409 U.S. 1027 (1972).

[56] MFS and Time Warner cite Northeast Cellular Telephone Co. v. FCC, supra. MFS comments at 5, Time Warner comments at 7. MFS also cites Indiana Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970). MFS Comments at 5. Those opinions do not say that a waiver must be based upon

32. Time Warner cites a statement in a staff-level decision denying a U S West waiver request that a "waiver request should concede the validity of a rule."[57] Time Warner apparently interprets the staff's statement to mean that a petitioner who requests a waiver of an agency rule must acknowledge that the relevant rule produces good results most of the time. We do not believe that WAIT Radio or any other relevant judicial precedent requires a petitioner to acknowledge or affirm that any of our rules serve the public interest as a condition precedent for seeking special relief.[58] Nor do we perceive any public interest reason for such a requirement. The standard is only that the justification for the waiver must show that application of the presumably valid rule would not be in the public interest in the particular circumstances under review. To the extent that the staff's U S West order could be interpreted to require an explicit affirmation of the validity of the rule, we now reject that interpretation.[59]

C. Special Circumstances

33. Positions of the Parties. NYNEX contends that special circumstances exist justifying a waiver throughout its region because it faces, or soon will face, significant competition in local exchange service and related interstate switched access offerings. NYNEX argues that it will be severely handicapped in responding to that competition because its switched access rates include large subsidy components mandated by existing regulatory requirements. According to NYNEX, LATA 132 produces about 50 percent of NYNEX's recurring and usage-based charges for special access and switched access revenue in New York State, and represents approximately 80 percent of NYNEX's total local business revenue in the state.[60] According to NYNEX, competing service providers have extensive telecommunications facilities in the area.

34. NYNEX supplies the following information about its competitors' networks. Teleport's approximately 325-mile long network in New York includes two switches in New York City; provides service for the equivalent of 377,000 voice-grade circuits; connects Manhattan to Brooklyn, Queens, and Staten Island; extends north to White Plains and east to Garden City and Hauppage; and extends west and south into twelve cities and towns in central and northern New Jersey.[61] MFS's network, with a switch in Jersey City, New Jersey and two

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circumstances that are unique in kind.

[57] U S West Communications, Inc. Petition for Waiver of Part 69 of the Commission's Rules, 7 FCC Rcd 4043, 4044 (Com. Car.Bur. 1992), cited in Time Warner Comments at 5 n.12.

[58] We note that U S West did not demonstrate any hardship that was unique in degree or in kind. The Common Carrier Bureau decision to deny that waiver request was not based solely upon that petitioner's failure to concede the validity of the rule.

[59] We do not address any of the other findings or conclusions in the U S West order.

[60] NYNEX Petition, Exhibit 10 at 1.

[61] NYNEX Petition, Exhibit 10 at 33; NYNEX Reply at 13 & Exhibit 7, Attachment 4.

remote switches in New York City, reaches 283 buildings in Manhattan, is slated for expansion to include Brooklyn, Queens, and Bronx, and covers White Plains and other areas in Westchester and Putnam Counties north of New York City.[62] These competitive access providers have 70,000 telephone numbers assigned to their use: 50,000 to Teleport and 20,000 to MFS.[63] Cablevision Lightpath is deploying a 3000-mile fiber-optic network that could deliver both telephone and advanced video services to subscribers on Long Island and New York City; has a 5ESS switch in Hicksville, Long Island; and already provides service to the State University of New York in Stony Brook, the Brookhaven National Laboratory, and in an alliance with AT&T, to Long Island University's campuses in Brookville, Brentwood, Southhampton, and Brooklyn.[64] Time Warner, which serves 910,000 cable television customers in New York City, is deploying a trial of switched telephone service in Queens.[65] NYNEX submitted copies of advertisements of Teleport, MFS, Cablevision Lightpath, ACC, and MCI Metro that suggest that those companies offer a range of services comparable to those that NYNEX provides.[66]

35. NYNEX contends that competing providers have already garnered a substantial share of the market for some local telecommunications services in LATA 132. NYNEX states that competitors have already collocated 36 cages in 16 wire centers in LATA 132. These wire centers provide access to 1.7 million access lines, of which 1 million are multi-line business lines. NYNEX states that approximately 2300 DS1 circuits are installed in these collocated offices for special access and Flexpath,[67] and approximately 1200 DS1 circuits are installed in these offices for switched transport, with another 500 DS1 switched circuits pending installation.[68] NYNEX states that 83 percent of the business lines in the two metropolitan statistical areas with boundaries roughly the same as those of LATA 132 are located in wire centers in which competing local exchange service providers have deployed facilities, are

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[62] NYNEX Petition, Exhibit 10 at 30; NYNEX Reply at 13; Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132") at 2.

[63] NYNEX Petition, Exhibit 10 at 34.

[64] NYNEX Petition, Exhibit 10 at 37-38 & Attachment 14; Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132") at 1-2.

[65] NYNEX Petition, Exhibit 10 at 39.

[66] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr 14, 1995).

[67] Flexpath is an intrastate high-capacity service used in conjunction with private branch exchange and Centrex services.

[68] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

providing service, or have announced plans to do so.[69] A 1992 survey of NYNEX's 200 largest customers in Manhattan found that NYNEX's share of the market for customer premise-to-IXC point of presence DS1 service[70] in Manhattan was approximately 64 percent.[71] A more recent market research study indicates that NYNEX retains approximately 52.5 percent of overall high-capacity business (special access and point-to-point exchange) in New York City.[72] NYNEX also states that at least 8.5 percent of the local business usage in LATA 132 originates on networks of competitive LECs.[73] Moreover, NYNEX has experienced significantly less growth in switched access traffic in LATA 132 than elsewhere in New York State, from which NYNEX infers that much of the growth has been carried by competitors. NYNEX reports that from 1991 to 1992, LATA 132 experienced a 2.95 percent growth rate, while the rest of New York State experienced a 7.46 percent growth rate in switched access minutes of use. According to NYNEX, the growth rate in central offices with expanded interconnection during the same period was only 1.26 percent, while the growth rate in Manhattan central offices without expanded interconnection was 1.94 percent.[74] Finally, NYNEX states that residential local messages in LATA 132 grew at a rate of 6.2 percent annually between 1992 and 1995, while business local messages in LATA 132 increased only 2.9 percent per year over the same period.[75] NYNEX believes that these circumstances indicate that a greater level of competition exists in the market for services to businesses. In a recent ex parte filing, NYNEX proposes a number of criteria to determine whether a particular market area is competitive.[76]

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[69] Id.

[70] DS1 is a high capacity service used by large customers.

[71] The shares of other major carriers was as follows: Teleport: 26%; MFS: 5%; AT&T: 4%; Locate: 1%; others: 1%. NYNEX Petition, Exhibit 10 at 2-3, 24; NYNEX Reply, Exhibit. 2 at 3.

[72] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[73] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[74] NYNEX Petition, Exhibit 10 at 25.

[75] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[76] Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William F. Caton, Acting Secretary, FCC (March 3, 1995). Specifically, NYNEX argues that a market area should be considered competitive when the state commission has authorized competing providers of local exchange service; competing providers have been assigned telephone exchange numbers; the incumbent LEC has made available to competing providers arrangements network interconnection, mutual compensation for termination of traffic, interim number portability, and related matters; and a specified percentage of the access lines in the market area are located in wire centers in which competing local exchange service providers have deployed facilities, are providing service, or have announced plans to

36. Several IXCs and competitive access providers question the sufficiency of NYNEX's special circumstances showing. These parties dispute NYNEX's claims that a significant amount of competition has developed or is developing in its region, and assert that NYNEX has exaggerated the effectiveness or imminence of local exchange service and switched access competition.[77] AT&T notes that NYNEX received over 99 percent of AT&T's 1992 access payments in the NYNEX region and that the total 1992 revenues of competitive access providers in the NYNEX region were equal to 2 percent of NYNEX's 1992 access revenue.[78] MFS says that the data NYNEX presented in this proceeding shows that competitive access facilities are available only to about a thousand buildings in the entire NYNEX region.[79] MCI says that the evidence presented in this proceeding does not show that NYNEX is subject to competition, but merely shows some regulatory changes that "create conditions under which competition could grow, or descriptions of how competitors have 'positioned' themselves for 'future growth' . . . ."[80] MCI submits that all the preconditions for effective local exchange competition do not yet exist and will take substantial time to implement, and that NYNEX's interstate switched access charges, the highest of any major LEC in the country, do not reflect the presence of effective competition.[81] Teleport contends that competitive access providers are not even positioned for switched access competition. Teleport says that conditions that are "necessary prerequisites to the development of local competition" have not been achieved in New York or anywhere else in the NYNEX region.[82] Teleport says that 90 percent of Teleport's New York business is attributable to facilities that are not switched access substitutes.[83]

37. In its reply, NYNEX states that the access billing and competitive access provider revenue numbers that AT&T presented to show that access competition is minimal are misleading. NYNEX notes that the substitution of competitive access provider facilities for LEC access often is not reflected in access billing to an IXC. For example, end users obtain facilities

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do so. According to NYNEX, 83% of the business lines in the two MSAs with boundaries roughly the same as those of LATA 132 are located in wire centers in which competing local exchange service providers have deployed facilities, are providing service, or have announced plans to do so.

[77] See, e.g., AT&T Comments at 5-10; CompTel Comments at 3; Locate Comments at 2; MCI Opposition at 5-6; MFS Comments at 6-7; Teleport Comments at 1, 3-9.

[78] AT&T Comments at 7.

[79] MFS Comments at 6.

[80] MCI Opposition at 5.

[81] Ex Parte Letter from Leonard Sawicki, MCI, to William Caton, Acting Secretary, FCC (Mar. 21, 1995), attachment.

[82] Teleport Comments at 4.

[83] Teleport Comments at 6.

from competitive access providers to connect with an AT&T point of presence to use Megacom and SDN services, which do not use the LEC local switch on the originating end of the call.[84] NYNEX claims that an accurate measurement of NYNEX's share of the special and switched access market in New York State produces a 1993 market share of 84.3 percent.[85] NYNEX also claims that a comparison of revenues understates competitive access provider market penetration because special access services produce lower per-minute revenues than switched services.[86] NYNEX believes a comparison of minutes of use would reveal a much greater presence of competitive access providers.

38. Analysis. We conclude that special circumstances exist that justify the limited waiver described below under the Northeast Cellular standard in a portion of NYNEX's service area. NYNEX has not demonstrated that circumstances justifying a waiver exist outside New York state, or even within New York, outside the New York City metropolitan area. NYNEX has, however, demonstrated that regulatory and economic developments justify the partial grant of its waiver request in the New York City metropolitan area. First, the state regulatory commission and NYNEX have taken a number of steps that remove significant barriers to the growth of competition in the access and exchange markets. Second, competitive service providers are active in the New York City metropolitan area, and are offering alternative sources of supply for many local telecommunications services within much of the LATA. The unusually large concentration of high-volume users in LATA 132 increases the likelihood of significant additional competitive entry. The record information on the degree of competition indicates that the earlier monopoly environment has eroded to a sufficient degree in LATA 132 to enable us to reasonably distinguish it as warranting grant of the waiver described herein.[87] These circumstances generally distinguish LATA 132 from other areas in the country, and justify a limited waiver of certain of our access charge rules at this time.

39. State and federal regulatory decisions, as well as actions taken by NYNEX, have made it more possible for competition to develop in access and exchange telephone markets in LATA 132 than has generally been possible in other parts of NYNEX's service area, or other areas of the country. For instance, basic service competitors are able to interconnect, and have been actively interconnecting, their own transmission facilities at NYNEX's central offices in New York, in accordance with decisions of the NYPSC and this Commission. NYNEX has been required to unbundle its local loops from local switching, which enables competing providers to offer their own switching service in conjunction with resold NYNEX loops (or their

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[84] NYNEX Reply at 8.

[85] NYNEX Reply at 9.

[86] NYNEX Reply at 11.

[87] See supra ¶¶ 24-29.

own loop service in conjunction with resold NYNEX switching).[88] NYNEX has reached agreements with several of its competitors that address issues such as interim arrangements for the mutual compensation for the interchange of traffic and local number portability. NYNEX reached such arrangements with Teleport in July 1994, with MFS in January 1995, and with Cablevision Lightpath in February 1995.[89] In addition, we note that the NYPSC has permitted competition in the provision of all intrastate telecommunications services, including local exchange service, as well as switched access, special access, interLATA and intraLATA toll, and private line. That Commission has certified new competitive entrants as "LECs," and has given them rights comparable to those of incumbent LECs such as NYNEX.[90] While our jurisdiction extends only to interstate telecommunications services, the joint and common character of the facilities providing exchange access and local exchange service means that the regulatory climate for intrastate telecommunications services affects the development of competition in the interstate access market.

40. We conclude that a waiver of our access charge rules is justified in New York State within LATA 132. While we lack sufficient information to reach conclusive findings regarding the precise state of competition in the rapidly-changing telecommunications marketplace, NYNEX has demonstrated that competitive providers have constructed extensive networks, and are beginning to provide service in New York City and many other portions of LATA 132, including the suburban areas north and east of New York City.[91] Moreover, the high volume

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[88] Comparably Efficient Interconnection Arrangements for Residential and Business Links, Case 91-C-1174, Opinion No. 91-24 (issued November 25, 1991) (requires the LEC to unbundle the loop into a "link" and a "port"); Comparably Efficient Interconnection Arrangements for Residential and Business Links, Case 91-C-1174, Order Directing the Filing of Tariffs (issued May 25, 1994) (requiring LECs to file tariffs permitting the resale of the "link" component of unbundled local loop services).

[89] NYNEX News Release, NYNEX Statement on Agreement with MFS, January 25, 1995. Cablevision News Release, Cablevision Systems Signs Cable Industry's First Interconnection Agreement With a Regional Bell Telephone Company, Feb. 16, 1995. Under the direction of the New York commission, NYNEX and its competitors are engaged in efforts to develop technology that would permit full local number portability. Proceeding on Motion of the Commission to Examine Issues Related to the Continued Provision of Universal Service and to Develop a Framework for the Transition to Competition in the Local Exchange Market, Case No. 94-C-0095 (released Mar. 8, 1995).

[90] Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition, Case 29469, Opinion No. 89-12, (issued May 16, 1989) (authorizing competitive provision of non-switched and private line services); Impact of the Modification of Final Judgment and the Federal Communications Commission's Docket 78-72 on the Provision of Toll Service in New York State, Case 28425, Opinion No. 92-13 (issued May 29, 1992); Opinion No. 92-13(A) (issued September 4, 1992) (authorizing competitive provision of switched local services).

[91] See generally Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132").

of traffic in certain New York City business districts, such as those in lower Manhattan, enables competitors to carry a substantial amount of telecommunications traffic using relatively few facilities, and presents special opportunities for the development of competition. We conclude that the information provided by NYNEX[92] gives a credible indication that, within LATA 132 in New York State, NYNEX's access and exchange competitors have real opportunities to enter various switched telecommunications service markets and are doing so. Most of the data presented relate to developments in LATA 132. NYNEX has presented relatively little information about markets outside the New York City metropolitan area, and we cannot conclude that grant of the same waiver would be warranted in other areas of New York State outside LATA 132 at this time.

41. Moreover, the circumstances that exist in LATA 132 do not exist in the NYNEX region outside New York State. The regulatory and structural changes occurring in LATA 132 have not occurred to date in the other states in the NYNEX region at a level comparable to those affecting LATA 132. While a number of pro-competitive steps have been taken in Massachusetts, developments there have not advanced as far as those in New York. NYNEX has not demonstrated that competitive access providers are investing capital or deploying services in Massachusetts to a degree comparable to New York. Competition appears to be at an even earlier stage of development in the other states served by NYNEX -- Maine, New Hampshire, Rhode Island, and Vermont -- than in New York and Massachusetts. Thus, we conclude that special circumstances do not exist justifying a similar waiver for NYNEX outside New York State.

42. Several parties have alleged that it is premature to grant NYNEX any additional pricing flexibility. It is not necessary to conclude that fully effective competition in access and exchange telephone markets has already developed in LATA 132 to establish that special circumstances exist that justify this waiver. We find sufficient competitive developments in LATA 132 to justify a limited departure from the pricing rules we have prescribed. We conclude that the public interest will be better served by our granting the additional pricing flexibility described below concurrent with the relaxation of significant market entry barriers, rather than by strictly applying all of our access charge rules despite the special circumstances that exist in LATA 132.

43. The grant of this waiver to address the special regulatory and economic circumstances in LATA 132 provides particular public interest benefits due to the especially high concentration of high-volume toll customers in LATA 132. As described above, steps have been taken in LATA 132 to remove barriers to competitive entry, and there is a significant competitive presence in LATA 132. The particularly high concentration of high-volume toll customers in the area indicates a high demand for access services and a relatively low cost of serving that demand, creating the potential for additional competitive entry. Under these circumstances, it is likely that an entrant with a relatively modest investment in a limited

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[92] See supra ¶ 35.

network could compete for the high-volume toll traffic while avoiding paying NYNEX's carrier common line and transport interconnection charges. Thus, the adverse public interest consequences that could result if these customers move traffic from NYNEX's network to competitive providers' networks in response to the incentives created by our access charge rules are likely to happen more quickly and to be more serious in LATA 132 than elsewhere.

44. Certain elements of our access charge rules -- in particular, the transport interconnection charge and the carrier common line charge -- create incentives, in an environment in which competition is possible, for high-volume users to shift their traffic from NYNEX's switched network to the networks of providers that enter based on the existing cost/price relationship, but that may be less efficient suppliers of telecommunications service (or to shift traffic to more inefficient NYNEX facilities). In the simplest terms, an artificially high price causes toll customers, at the margin, to consume other goods and services rather than purchase a higher, efficient amount of interstate long-distance services. The substantial increase in long-distance volume that occurred after the introduction of subscriber line charges and the resulting decreases in switched access charges and long-distance rates demonstrate that overpriced usage charges do discourage usage.[93] In addition, private line services and partially dedicated services that bypass LEC switches, but not IXC switches, can often be used as a substitute for switched access services. High-volume and even moderate-volume business customers have an incentive to substitute dedicated facilities, which may be the local exchange carrier's special access facilities, or those of an alternative provider, whenever the price of dedicated access is less than the price that the customer would pay for services that use switched access. Switched access pricing that imposes excessive charges on larger users creates an incentive for them to substitute dedicated access for switched access even if the cost the carrier incurs to provide the dedicated access is greater than the cost to the LEC of providing switched access. Such inefficiencies are magnified in an area such as LATA 132 where there are numerous high-volume toll users coupled with the availability of competing services. Finally, artificially high prices of an incumbent may induce additional entry in the expectation that the incumbent's high prices will continue. This may lead a provider that would not be the most efficient supplier of service to invest in facilities producing an inefficient allocation of resources in the economy. Such a result seems particularly likely in LATA 132 as the concentration of high-volume customers would make such inefficient entry even more attractive. For these reasons, given the concentration of high-volume toll users in LATA 132, continued application of certain of our access charge rules is not in the public interest in LATA 132 in the face of growing competition.

45. We conclude that in this case LATA 132 is a reasonable geographic unit for gauging the development of competition. LATA boundaries were defined in proceedings before an antitrust court, were based on technical characteristics of the Bell System in the early 1980s, and are not necessarily reasonable territorial units for assessing competitive developments in all specific geographic market areas. In this case, however, the use of LATA 132 is reasonable.

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[93] See MTS and WATS Market Structure, CC Docket No. 78-72, Report and Order, 2 FCC Rcd 2953, 2954, 2957 ¶¶ 9-11, 29 (1987).

LATA 132 is roughly congruent with the two MSAs (metropolitan statistical areas) that the Census Bureau uses to analyze the New York City metropolitan area. Moreover, LATA 132 is a widely recognized geographic market unit in the telecommunications industry. For example, the NYPSC has established a special short-haul toll rate structure for NYNEX in the LATA, known as the Regional Calling Plan. Emerging competitors providing short-haul toll service must compete against this rate structure. Thus, we conclude that it is reasonable to use LATA 132 to define the geographic scope of this waiver.

46. Finally, we conclude that these real opportunities for access and exchange competition in LATA 132 create special circumstances that justify a waiver of certain of our access rules. In the presence of demonstrated opportunities for competition to grow, we believe it is reasonable to grant NYNEX greater flexibility in the manner in which it recovers certain rate elements than is otherwise permitted under our access charge regime, as discussed further below. Moreover, as we conclude below, a different means of assessing these rate elements is reasonable within LATA 132 and better serves the public interest than would application of our rules.[94]

D. Public Interest Factors

47. Positions of the Parties. Many parties suggest that waivers are not a good vehicle for solving problems described in the NYNEX petition because waivers may delay more generic and comprehensive solutions. Some suggest that a waiver would be improper, or at least unwise, because the NYNEX petition raises fundamental and important questions that should be considered in a rulemaking proceeding.[95] Some oppositions or comments suggest that we should not grant any waivers to alleviate any of the problems described in the NYNEX petition because waivers could reduce the LECs' zeal for access charge reform and because a decision to grant a waiver will provoke other waiver requests that will distract Commission staff.[96]

48. Analysis. We do not find the contentions of the opponents persuasive. This Commission has ample authority to adopt any rule revisions that would serve the public interest

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[94] In light of our conclusion, based on the specific information before us, that a partial grant of NYNEX's proposed waiver is warranted by special circumstances in LATA 132, we find it unnecessary to address the general criteria for determining whether a particular market area is competitive that NYNEX proposes in its recent ex parte filing. We note that similar issues may be addressed in an upcoming notice of proposed rulemaking in our price cap proceeding. See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, FCC 95-132 (released Apr. 7, 1995).

[95] Ad Hoc Opposition at 2; AT&T Comments at 2-3; ALTS Opposition at 4-6; EMI Comments at 6-7; Teleport Comments at 12. Time Warner contends that waivers must be limited to "minor decisions" regarding the application of rules. Time Warner Comments at 2.

[96] Ad Hoc Opposition at 8; ALTS Opposition at 10.

more effectively than existing rules, with or without the support of enthusiastic LECs. We also have ample authority to establish processing priorities for our staff. The special circumstances described above warrant acting affirmatively on the waiver petition now, rather than making NYNEX wait until the Commission can conduct broad-based rulemaking proceedings.

49. We conclude, however, that we should limit the scope of this waiver. We address below the issues raised by NYNEX's proposals regarding local switching, the transport interconnection charge, and the carrier common line charge, and explain why we find that the limited waivers we grant would serve the public interest.

1. Local Switching

50. We do not believe we can resolve on the basis of this record the local switching questions raised by NYNEX. NYNEX claims that the recovery of non-traffic sensitive costs through a per-minute charge exposes NYNEX to special hardships and risks. To support its assertion, NYNEX submitted a series of studies based on its unseparated switching costs that directly assigned costs to broad service categories by employing subaccount level details from the Uniform System of Accounts, other subsidiary records, and the switching cost information system. According to NYNEX, these studies show that a significant portion of the local switching costs are non-traffic sensitive in nature. This Commission has long recognized that relying on usage sensitive charges to recover non-traffic sensitive costs produces some uneconomic results, but we have never definitively determined that the local switching element contains non-traffic sensitive costs. Past Commission discussions regarding the traffic sensitive and non-traffic sensitive components of local switching costs are at best ambiguous, and some statements in prior orders arguably could be construed as finding that it may be difficult to identify non-traffic sensitive costs of digital switches.[97]

51. A determination that some portion of the local switching element represents identifiable non-traffic sensitive costs requires analysis of the functions performed by various switching components accounted for in the local switching separations category and the related costs. While NYNEX's study produces an amount allegedly representing the non-traffic sensitive costs included in the local switching category, NYNEX has not carried its burden of demonstrating the extent to which digital switches are characterized by non-traffic sensitive costs. Based on the present record, we are unable to conclude that NYNEX has properly established the amount of local switching costs, if any, that are non-traffic sensitive in character.

2. Transport Interconnection Charge

52. We established the transport interconnection charge on an interim basis because of the uncertainty surrounding the nature of the costs that are recovered through that charge. In a

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[97] See Amendment of Part 67 of the Commission's Rules, Recommended Decision and Order, 2 FCC Rcd 2551, 2558-60 (Joint Board 1987); and Amendment of Part 67 of the Commission's Rules, Recommended Decision and Order, 2 FCC Rcd 2639, 2640-42 (1987).

pending rulemaking proceeding designed to produce generic solutions for the entire industry, we have sought comment on the nature of the revenues recovered through the transport interconnection charge and the appropriate long-term recovery mechanism.[98] In that proceeding, NYNEX and many other parties submitted comments estimating the makeup of the revenues in the transport interconnection charge, including some alleged subsidy components.

53. NYNEX's proposal in this waiver proceeding to reduce the per-minute transport interconnection charge and recover part of the revenues through a different charge appears not to be related to the estimates of subsidy components in the transport interconnection charge that NYNEX itself submitted in the rulemaking proceeding.[99] Rather, NYNEX's proposal in this proceeding appears to be designed to result in a particular, pre-determined price per minute for switched access. Accordingly, we decline to grant NYNEX a waiver to recover some transport interconnection charge revenues from IXCs on any basis other than a per-minute charge.

54. NYNEX also seeks a waiver to establish different transport interconnection charge rates in different geographic zones, and for multi-line business users and for residential and single-line business users. NYNEX will be permitted to establish four separate rate elements within the interconnection charge category, one for each of the three zones in LATA 132, as well as a baseline element for non-LATA 132 usage, subject to certain conditions discussed below. We conclude that, given the special circumstances that exist in LATA 132 in New York State, the public interest will be served by permitting NYNEX to deaverage the transport interconnection charge by geographic zone. This will permit NYNEX to respond to the growing competition in LATA 132 by lowering its interconnection charge rate on less than a region-wide basis, thus moving its prices towards cost in those areas that have the densest traffic patterns and removing incorrect pricing signals that could trigger entry by competitors that may be less efficient than NYNEX. Therefore, the public interest will be better served by granting the limited waiver of our rules governing the transport interconnection charge rather than it would be from rigid adherence to our current rules.

55. This pricing flexibility, however, is subject to the following conditions. First, NYNEX will not be permitted to raise any interconnection charge rate above the interconnection charge rate that is in its tariff on the day before the tariff implementing this aspect of the waiver takes effect.[100] Thus, NYNEX will not be able to raise the rate for any interconnection charge element to offset a reduction in the rate for another interconnection charge element. Second,

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[98] See Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7063-66 (1992).

[99] NYNEX Comments, Transport Rate Structure and Pricing, CC Docket No. 91-213 (submitted Feb. 1, 1993).

[100] Since NYNEX has characterized this waiver as being interim in nature, we have not provided for upward pricing flexibility to reflect increases in the PCI. If we expected this waiver to be of a more permanent nature, we would have considered an upward PCI adjustment mechanism.

NYNEX may not, once it lowers the rate for any interconnection charge element, thereafter raise the rate for that element. This will prevent NYNEX from alternatively raising or lowering the rate for one element deliberately to undermine a rival's business plan. Finally, because some of the revenues recovered through the interconnection charge are transport related, we believe it necessary to establish a floor below which the rate for the interconnection charge may not go. Therefore, we conclude that the rate for any interconnection charge must be sufficient to recover the element's relative share of the tandem switching costs that are included in the interconnection charge category.[101]

56. Deaveraged pricing of the transport interconnection charge, using the zones in LATA 132 that were established for zone density pricing, would enable NYNEX to reduce the charge by a greater degree in Zone 1 offices within LATA 132 than in offices in less dense zones. These Zone 1 offices contain the greatest density of telecommunications traffic and are the offices in which competition is likely to grow most rapidly. The waiver we grant gives NYNEX greater flexibility to move its rates in the direction of cost. The transport interconnection charge includes some revenues related to transport costs, which we have already found are lower in higher-density zones.[102] To the extent that the transport interconnection charge recovers revenues related to the costs of other access elements or other telecommunications services, these costs are likely to be lower in zones with a more dense concentration of traffic.[103] By permitting NYNEX to move its prices towards cost in those areas that have the densest traffic patterns and are open to competitive entry, we will enable NYNEX to minimize distortions in the total switched access per-minute rate that have the greatest adverse impact.

57. Moreover, competitive service providers will be able to use NYNEX's unbundled loops to bypass some of NYNEX's switched access services. Therefore, NYNEX is likely to be under some competitive pressure to reduce its per-minute transport interconnection charge in high-density zones. Given the high density that particularly characterizes LATA 132, permitting NYNEX to deaverage this charge would enable NYNEX to target rate reductions to the customers who are most likely to bypass its switched services in favor of potentially less efficient services. Such customers are particularly likely to be found in Zone 1 of LATA 132 where high-volume toll users are located and competitive entry is permitted, as discussed in paragraph 43, supra. We believe the public interest would be served by giving NYNEX the flexibility to respond in this way to the market conditions that exist in LATA 132, which, in the previous section of this order, we found constitute special circumstances. This action is

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[101] That relative share would be defined by the ratio of the number of interstate access minutes associated with the respective rate element to the total number of NYNEX interstate access minutes.

[102] See Transport Expanded Interconnection Order, supra, 7 FCC Rcd at 7746.

[103] We emphasize that we find only that such a cost relationship is likely; we do not reach a conclusive finding to this effect in this waiver proceeding, nor do we believe such a finding is necessary for us to grant this waiver.

comparable to our grant of zone density pricing of interstate special access and facilities-based transport charges at the same time that we ordered LECs to provide expanded interconnection, which facilitated competition with those LEC services.[104]

58. We decline to permit NYNEX to establish different transport interconnection charge rates for access minutes attributable to multi-line business users and for minutes attributable to residential or single-line business users. Some parties have argued that such a distinction would be unreasonably discriminatory; NYNEX argues to the contrary.[105] Permitting such rate differences in an element like the transport interconnection charge, which recovers costs of an unclear nature, is a more substantial departure from our current practice than deaveraged pricing of that charge by density pricing zones. We conclude that limiting NYNEX's ability to deaverage its interconnection charge rates in a manner consistent with the already existing density zones balances the needs of NYNEX to have pricing flexibility and the developing nature of competition in LATA 132. We find that grant of further pricing flexibility at this time is not supported on the record.

3. Carrier Common Line

59. Positions of the Parties. No party objects to NYNEX's proposal regarding bulk billing of long-term support revenues. In its reply comments, NYNEX made a minor modification to its proposal, basing the bulk billing on an assessment computed using the number of interstate minutes of use originating or terminating in NYNEX's region.[106] None of the commenters appear to object in principle to the use of some form of bulk billing that would effectively guarantee recovery of amounts that NYNEX is required to transmit to other carriers. Many of the parties, however, identify a variety of possible disadvantages that might result from implementation of the plan to recover a portion of the remaining common line revenue requirement through presubscribed line charges.

60. ALTS and Teleport contend that the NYNEX petition does not comply with the criteria adopted in the 1986 Guidelines Order, in which we denied several LECs' petitions for waiver of the Part 69 rules governing their recovery of the common line element, but established guidelines for consideration of new requests for waiver of those rules.[107] ALTS notes that the

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[104] See supra ¶ 12.

[105] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Mar. 22, 1995), Attachment "Selectively Reducing the Interconnection Charge As Applied To Multi-line Customers and Competitive Zones Is Consistent With the Communications Act."

[106] NYNEX Reply Ex. 10 at 7-8.

[107] ALTS Opposition at 6-10, Teleport Comments at 11 (citing Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, 104 FCC 2d 1132 (1986) (Guidelines Order), recon.

Guidelines Order required plans to terminate in one year and to assess nationally uniform usage sensitive charges for terminating switched access.[108] ALTS also claims that the Guidelines Order disfavored plans that guarantee exchange carrier recovery of non-traffic sensitive costs.[109] NYNEX responds that the criteria in the Guidelines Order were designed for interim waivers while the Commission completed a then pending proceeding to determine the subscriber line charge formula. Accordingly, NYNEX reasons that the interim period described in the Guidelines Order expired years ago and those interim waiver criteria are not applicable to this petition.[110]

61. Some commenters claim that implementation of the plan will disadvantage end users, including residential customers. Ad Hoc says that adoption of the NYNEX plan could force IXCs to deaverage toll rates,[111] and AT&T says that implementation of the plan would increase pressures to deaverage nationwide toll rates.[112] MFS and ALTS assert that a plan imposing different charges in different areas within a state will create unreasonable discrimination.[113] MFS notes that other zone pricing plans that this Commission has permitted are based upon cost differences between or among zones.[114] NYNEX has not presented evidence to show common line cost differences among zones or LATAs. MFS, ALTS and EMI also contend that the NYNEX plan produces end user discrimination between business customers with multiple lines and other customers.[115]

62. NYNEX assumes that changes in access charges will be flowed through in a manner that affects end user choices. Most of the pleadings do not challenge that assumption. Cable & Wireless says that marketplace forces in the interexchange market will compel IXCs to flow

denied, 2 FCC Rcd 28 (1987)).

[108] ALTS Opposition at 2.

[109] ALTS Opposition at 7.

[110] NYNEX Reply at 21-22.

[111] Ad Hoc Opposition at 2,5.

[112] AT&T Comments at 18 n.31. The Comments of John Staurulakis, Inc. at 1-3 and the NTCA Reply at 2-4 also express concern that the NYNEX plan could lead to toll rate deaveraging.

[113] MFS Comments at 9-12, Reply at 5-6; ALTS Opposition at 9. The AT&T Reply at 5-6 and the EMI Reply at 2 express the same concern.

[114] MFS Comments at 10.

[115] MFS Comments at 9; ALTS Opposition at 9; EMI Comments at 9.

through reductions in access charges.[116] The New York Clearing House Association, however, asserts that there is a substantial chance that the IXCs will not flow through the access charge reductions and suggests that we modify the NYNEX plan to require a flow through.[117]

63. Several parties assert that substituting an assessment per presubscribed line for an assessment per access minute will create an incentive for IXCs to avoid serving low-volume users. Each presubscription would increase IXC costs and the low-volume users would not add enough revenues to offset the additional costs.[118] AT&T notes that the Guidelines Order rejected an alternative non-traffic sensitive cost recovery proposal by US West that would have had that effect.[119]

64. Several parties contend that implementation of the plan will unfairly disadvantage some IXCs. Some noted that a presubscribed line assessment in one region could create a windfall for regional IXCs who do not originate traffic in the region.[120] Such carriers would not pay access charges for terminating traffic while carriers that originate inter-regional calls in the NYNEX region would pay charges for all of NYNEX non-traffic sensitive costs plus per access minute terminating charges to another LEC. The Sprint reply suggests that any single region presubscribed line charge be limited to originating traffic in order to avoid that problem.[121] The NYNEX reply contends that it is reasonable to recover common line costs from IXCs that originate traffic. NYNEX says the presubscribed line charge is a surrogate for the end user common line charge and that charge recovers costs for both originating and terminating usage from the subscriber.[122]

65. Some IXCs claim that adoption of the NYNEX plan would be prejudicial to IXCs because it would be difficult or impossible for them to verify the minutes attributable to multi-or single-line usage.[123] CompTel says that it would also be difficult for IXCs to verify the number

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[116] Cable & Wireless Comments at 7-8.

[117] New York Clearing House Association Comments at 5-6.

[118] AT&T Comments at 18, Reply at 1-2; ALTS Opposition at 8-9; RCI Comments at 10; EMI Comments at 3-4; Teleport Comments at 11.

[119] AT&T Comments at 18; See Guidelines Order, supra, 104 FCC 2d at 1182-83.

[120] AT&T Comments at 15-17, Reply 1-2,7; CompTel Comments at 8; RCI Comments at 9-10; EMI Comments at 3,10; MFS Comments at 18-19.

[121] SPRINT Reply at 7.

[122] NYNEX Reply at 30.

[123] CompTel Comments at 7; RCI Comments at 8; EMI Comments at 9-10.

of presubscribed lines attributable to a particular carrier.[124] In its reply, NYNEX notes that its plan included auditing provisions and says that it will modify that commitment to include more frequent audits, to explore the possibility of sample audits of individual IXC bills, and to work with IXCs to identify the data that access customers require for bill verification.

66. MFS and LOCATE contend that a presubscribed line plan is objectionable because charges based upon presubscribed lines tend to insulate NYNEX from the effects of competition by guaranteeing the recovery of non-traffic sensitive costs even if NYNEX does lose business to switched access competitors.[125] ALTS also claims that a presubscribed line plan guarantees the recovery of NYNEX non-traffic sensitive costs. ALTS contends that such a result is objectionable because it shifts business cycle risks between NYNEX and the IXCs and such a shift in risks violates criteria for alternative non-traffic sensitive cost recovery plans adopted in the Guidelines Order.[126] NYNEX replies that MFS did not understand the annual price cap adjustment in the NYNEX plan: "Within the Common Line basket, the per-line charge would be recalculated each year to maintain the same amount of revenues as would have [been] generated by the per MOU CCL rate."[127] NYNEX also asserts that the NYNEX plan does not guarantee the recovery of NYNEX revenues during the access year because NYNEX revenues would decline if NYNEX "lost access lines to competition . . . ."[128] Therefore, NYNEX contends that its plan does not guarantee the recovery of non-traffic sensitive costs.[129]

67. Analysis. We conclude that NYNEX's alternative plan for recovering carrier common line revenues is in the public interest within LATA 132 in New York State. The NYNEX waiver requests relating to the carrier common line element do not present unresolved questions with respect to the nature of the costs that are reflected in that element. We have long recognized that common line charges recover non-traffic sensitive costs; the recovery of some common line costs through usage charges causes heavy users of switched interexchange services to subsidize other users of telecommunications services; and the inclusion of such subsidies in access charges produces results that detract from economic efficiency.[130] When we established

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[124] CompTel Comments at 7.

[125] MFS Comments at 13-16; LOCATE Comments at 3.

[126] ALTS Opposition at 6-8.

[127] NYNEX Reply at 28.

[128] Id.

[129] Id. at 29.

[130] See especially MTS and WATS Market Structure, CC Docket 78-72, Phase I, 93 FCC 2d 241 ((1983) (Third Report and Order)(Access Order), modified on recon., 97 FCC 2d 682 (1983) (First Reconsideration), modified on further recon., 97 FCC 2d 834 (1984), (Second Reconsideration), aff'd

the access charge rules, we limited the recovery of common line costs through subscriber line charges in order to avoid establishing those charges at a level that might pose some risk to universal service. The access charge rules established carrier common line charges to enable LECs to recover the remainder of the common line costs that are not recovered through subscriber line charges paid by end users.

68. We first consider the relevance of our 1986 Guidelines Order, which some parties argue precludes grant of NYNEX's requested waiver. We then consider the issues raised regarding NYNEX's requested mechanism for recovering its long-term support obligations. Finally, we address the public interest implications of NYNEX's requested recovery mechanism for its own common line costs.

69. Effect of the Guidelines Order. In late 1985 and early 1986, a number of LECs filed petitions for waiver of those portions of Part 69 of the Commission's access charge rules governing their recovery of the common line element. The carriers proposed a variety of alternative recovery mechanisms. In late 1986, the Commission adopted the Guidelines Order, which denied the pending waiver requests, but established various guidelines for Commission consideration of new requests for waiver of those rules.[131] In 1987, the Commission, upon recommendation of a Federal-State Joint Board, implemented a plan for increasing the recovery of common line costs through the residential subscriber line charge from $2.00 per month to $3.50 per month.[132]

70. In view of our 1987 decision changing the method for recovering common line costs, as well as the many other changes in regulation and market conditions that have occurred since 1986, we conclude that the criteria in the Guidelines Order are no longer controlling with respect to our decision to grant or to deny a waiver to recover some non-traffic sensitive costs in an alternative manner. By its terms, the Guidelines Order was intended to provide LECs with flexibility during a limited interim period that would not limit the Commission's ability to devise a permanent plan for recovery of non-traffic sensitive costs. That interim period has long since expired. In particular, the requirements of the Guidelines Order were addressed to a monopoly market, while the waiver request under consideration alleges an increasingly competitive

in principal part, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1085 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 99 FCC 2d 708 (1984) (Third Reconsideration), aff'd, American Tel. and Tel. Co. v. FCC, 832 F.2d 1285 (D.C. Cir. 1987), modified on further recon., 101 FCC 2d 1222 (1985) (Fourth Reconsideration), recon. denied, 102 FCC 2d 849 (1985) (Fifth Reconsideration).

[131] See Guidelines Order. Those guidelines limited the alternatives to a capacity charge model and end user charge model. All alternative cost recovery plans were to expire in one year, were limited to originating usage, and were to be designed to preserve the common line pooling arrangement and the non-premium access discount in offices that did not have equal access.

[132] MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987).

marketplace. We note, however, that to the extent the Guidelines Order recognized that some alternatives to the per-minute carrier common line charge that do not affect the level of subscriber line charges might produce better results than charges to IXCs based on access minutes, NYNEX's petition in this proceeding is generally consistent with the Guidelines Order.

71. Long-Term Support Obligations. Long-term support payments do not reflect NYNEX costs at all. Rather, that portion of the common line revenue requirement recovers amounts that NYNEX is required to transmit to other LECs to recover some of their non-traffic sensitive costs. The inclusion of long-term support in a per-minute switched access charge handicaps NYNEX in competing with any switched access offerings of competing access providers. The competing providers could base their prices on their own costs without including costs of other access providers in other areas.

72. None of the comments and oppositions appear to object in principle to the use of some form of bulk billing that would effectively guarantee recovery of amounts that NYNEX is required to transmit to other carriers. Imposing a collection risk upon NYNEX by retaining long-term support recovery in the per-minute carrier common line charge applicable in LATA 132 would be unfair under the competitive circumstances of LATA 132, and would not produce any economic efficiency benefits. Given the special circumstances in LATA 132, specifically the increased potential for exchange and access competition in that area, we conclude that permitting NYNEX to recover its long-term support costs in the manner described in the NYNEX reply (bulk billing based on IXCs' market share of minutes originating and terminating in LATA 132) is in the public interest because it avoids distortions in consumer choices and provider investment decisions. In view of our decision to limit the geographic scope of the waiver, such bulk billing would be limited to the portion of long-term support obligation that is currently recovered through carrier common line charges attributable to LATA 132 usage.

73. NYNEX's Own Common Line Costs. We conclude that a waiver of our rules relating to the recovery of NYNEX's carrier common line revenues relating to its own common line costs in LATA 132 would also produce public interest benefits in light of the special circumstances that exist in LATA 132. First, we conclude that a waiver is in the public interest to avoid interference with the continuing development of interstate access competition. As previously noted, a usage charge for non-traffic sensitive costs creates a subsidy from high-volume users to low-volume users. Business users with multiple lines are likely to be high-volume users of interexchange services. Consequently, most of NYNEX's carrier common line charges associated with minutes originating from or terminating to business customers with multiple lines represent a subsidy to recover other end users' interstate common line costs.[133] The ill effects of such inefficient pricing, such as encouraging inefficient entry, will be greater

[133] NYNEX's cost per subscriber line in New York is $6.27. NYNEX 1994 Annual Access Tariff Filing, Transmittal No. 288, Section 2.1, App. 1 at 1, App. B at 6. Thus, the first 33 minutes of calling by a multi-line business customer in a month would cover the $0.27 cost of the subscriber line above the $6.00 cap at the CCL rate of $0.008248. The revenues from the remaining minutes each month support lower rates for other users.

in areas, such as LATA 132, that have an especially high concentration of high-volume users and are open to new entrants and growing competition.[134] In an environment characterized by increasing opportunities for competition, rules that raise LEC per-minute charges for access services to levels that are substantially higher than the underlying cost of those services could encourage inefficient entry by competitive service providers, while impeding NYNEX's ability to respond to developing competition.[135] These effects will, of course, be limited to areas in which entry is possible. NYNEX has demonstrated that LATA 132 is such an area.

74. In addition to facilitating the development of competition in the interstate access market, the NYNEX plan should serve the public interest insofar as it results in per-minute interstate switched access rates that are closer to cost. Matching interstate access rate structures and levels more closely with economic costs, especially in an area with a high concentration of high-volume users, such as LATA 132, should both stimulate the potential growth in the purchase of access services and reduce LEC costs in providing such services. These developments should, in turn, increase overall consumer welfare and lead to lower overall access costs. Artificially high rates suppress demand, encourage customers to shift traffic to alternative carriers that may not be the most efficient providers, and produce incorrect market entry signals. The public interest will be served by granting a limited waiver because of the substantial adverse effects that will result from rigid adherence to our common line pricing rules under the special circumstances described above.

75. Moreover, the NYNEX plan is likely to produce immediate, additional benefits to the extent that IXCs, in turn, lower their rates for high-volume users to reflect the reductions in the per-minute carrier common line charges assessed by NYNEX. It is reasonable to expect IXCs to pass along access charge reductions to high-volume customers in LATA 132 because of the competition for those customers' toll service and the individualized nature of many of the service offerings. By contrast, an access charge reduction by a single LEC is unlikely to have a substantial impact on basic message telephone service (MTS) long-distance rates because those rates are established on a nationwide averaged basis. We conclude that competitive conditions in interexchange markets are likely to cause IXCs to respond to changes in access pricing with changes in long-distance pricing that will affect the choices that business customers with multiple lines make. We conclude that the likelihood that multi-line business customers will experience long-distance rate reductions is a factor weighing in support of our conclusion that the waiver proposal is in the public interest. We decline, however, to adopt the New York Clearing House Association's suggestion that IXCs be required to flow through access charge reductions to their business customers in this order granting a waiver to NYNEX. We would prefer to consider imposition of requirements upon persons other than the petitioner in separate proceedings.

76. We conclude that many of the potential disadvantages of NYNEX's common line plan raised by opposing parties are either unlikely to occur or are not likely to have sufficient

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[134] See supra ¶¶ 43-44.

[135] See supra ¶¶ 26-29.

impact to outweigh the potential benefits. For example, we conclude that IXCs are unlikely to respond to the NYNEX plan by changing the geographically averaged nature of their basic offerings designed for residential and small business customers. Our decision to limit the waiver to LATA 132 makes such a result even more unlikely. The NYNEX plan appears less likely to discourage IXCs from serving low-volume users than the U S West plan that was rejected in 1986. U S West had proposed to base interexchange carrier assessments on the number of presubscribed customers rather than the number of presubscribed lines. A per-customer assessment would create an even greater incentive to discourage presubscription by low-volume, single-line customers. The U S West plan also would have been implemented in the mid-1980s when the initial presubscription process was still in progress. There was accordingly greater reason for concern about the possible impact of changes in access charge assessments upon the presubscription process. The per-customer assessment that U S West proposed would also have been much higher than the assessment NYNEX has proposed because the costs to be recovered through carrier common line charges were much greater in 1986 than they are now. More importantly, the U S West plan would have been implemented in a multi-state region, while we have decided to limit any NYNEX waiver to LATA 132. Interexchange carriers are far less likely to change their marketing methods for services residential customers use if the changes in access assessments to interexchange carriers are confined to such a limited area. Being the presubscribed long-distance carrier for a customer provides additional opportunities to sell related products and services to that customer.

77. We also conclude that price differences between LATA 132 and other areas in New York State or the NYNEX region are not likely to result in unreasonable discrimination. Given the density of traffic in LATA 132, costs are likely to be lower there than elsewhere in NYNEX's region. As described in paragraph 43, supra, the problems that per-minute recovery of non-traffic sensitive costs create for the economy and for LECs are particularly acute in that area because of the concentration of high-volume toll users in LATA 132, which is open to, and is realizing actual, competitive entry. Moreover, it is prudent initially to limit application of such an alternative recovery mechanism, at least until we have an opportunity to observe actual results.

78. The contention that NYNEX's common line plan would result in unreasonable discrimination between business customers with multiple lines and other customers is incorrect. If the plan results in a reduction of charges to the business customers who indirectly pay more than their share of non-traffic sensitive costs under the current system, the plan will, in fact, reduce discrimination among end users.

79. We decline to limit the application of the NYNEX carrier common line plan to originating traffic. Inasmuch as we have already decided to limit the access elements affected by a waiver and to limit the geographic scope of the waiver, the exclusion of terminating access charges might make the effects of the plan too limited to produce meaningful benefits. In addition, we find it unlikely that competitive IXC presence in LATA 132 will be significantly diminished by the grant of this waiver. NYNEX incurs common line costs in proportion to the

number of lines, and thus it is not unreasonable to recover these costs from IXCs on the basis of the number of lines presubscribed to each carrier.

80. In view of NYNEX's commitments to provide for frequent auditing and to work with IXCs to identify data needed for bill verification, we believe that auditing and verification should not present any insurmountable problems.

81. The NYNEX common line plan does not guarantee that NYNEX will retain revenues that NYNEX might lose under existing rules. In implementing its presubscribed line charge plan for the CCL charge, NYNEX will recalculate the presubscribed line charge each year. Under the annual price cap adjustment, NYNEX will compute its CCL rate at the level that would have been used if no waiver had been granted. This CCL rate will be adjusted for LATA 132 to reflect the recovery of long-term support costs through a bulk-billing mechanism. The minutes attributable to LATA 132 business customers with multiple lines will then be multiplied by the new CCL rate for LATA 132 to produce an amount to be recovered through the per presubscribed line charge. That amount will be divided by the number of presubscribed lines in LATA 132 supplied by NYNEX during the relevant base period to produce the per presubscribed line charge for the following access tariff year. The annual price cap adjustment is designed to produce annual revenues for NYNEX and aggregate annual IXC access costs that do not differ significantly from those that application of the existing access charge and price cap rules would produce.

82. The substitution of presubscribed line charges for access minute charges would, however, produce some change in risks and rewards during the course of any given year during which an access tariff remains in effect, because usage is likely to fluctuate over the course of the year more than the number of local loops will fluctuate. This would presumably be true whether changes in demand were attributable to switched access competition, business cycle fluctuations, or business and population migration in or out of a particular LATA, state or region. The actual effects of demand fluctuations upon fluctuations in NYNEX or IXC earnings may, of course, be quite modest. We do not believe that a reduction in NYNEX risks or rewards that results from recovering non-traffic sensitive costs on a per-line basis would be inequitable. Recovery of per-line costs on a per-line basis would produce a better match between cost fluctuations and revenue fluctuations than recovery of per-line costs on a per-minute basis. NYNEX common line revenues will vary with the number of lines provided. If NYNEX loses subscriber lines because of local exchange competition, it will lose corresponding subscriber line charges as well as the flat, per-line charge permitted by this order. Thus, NYNEX is not held harmless.

83. We conclude that the probable advantages of the modified NYNEX plan for recovery of some common line costs in LATA 132 through presubscribed line charges outweigh the probable disadvantages of such a plan. Implementation of the waiver will, of course, require modifications in the plan NYNEX has described to reflect the limitation to LATA 132 and the modifications described in Appendix 10 of NYNEX's reply comments. The usage requirements and line counts should reflect LATA 132 usage and line counts, rather than lines or usage in the

New York study area or the entire NYNEX region. Finally, if the tariffs implementing the transport interconnection charge component of this waiver are filed after the tariffs implementing the Commission's recent decision on LEC price cap performance review are filed, NYNEX may amend the tariffs implementing the LEC price cap performance review order.[136] Such tariff changes shall be filed on not less than forty-five days' notice, to become effective August 1, 1995.

VI. ORDERING CLAUSES

84. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. §154(i), and Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, that the Petition for Waiver filed by the NYNEX Telephone Companies on December 15, 1993, IS GRANTED IN PART and DENIED IN PART subject to the limitations and conditions described herein.

85. IT IS FURTHER ORDERED that Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, ARE WAIVED for the purposes outlined in Paragraph 80. NYNEX shall cite the "FCC" number of this Order as its authority.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[136] Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, FCC 95-132 (released Apr. 7, 1995).

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: NYNEX Telephone Companies, Transition Plan to Preserve Universal Service in a Competitive Environment, Petition for Waiver

In December 1993, NYNEX filed a petition for waivers of the Commission's rules to enable NYNEX to implement its Universal Service Preservation Plan ("USPP"). In particular, the NYNEX petition for waiver of the Commission's access charge and price cap rules (Parts 61 and 69) seeks (1) to reduce per-minute access charges for the carrier common line, local switching, and transport interconnection charges throughout its entire region, and to recover most of the lost revenues from long-distance carriers in a manner other than that prescribed in the rules; and (2) a waiver of the price cap rules to provide additional pricing flexibility. NYNEX contends that it needs to reduce per-minute access charges in order to meet switched access competition and to enable access charge structures to reflect the effects of competition, especially in the New York City metropolitan area.

This Memorandum Opinion and Order, based on state and federal regulatory changes as well as steps taken by NYNEX to create an environment open to competitive entry for exchange and access services in the New York City metropolitan area. In this Order, the Commission grants in part the waiver request only with respect to the carrier common line charge in LATA 132. The common line waiver would permit NYNEX to recover long term support costs through an assessment based on toll minutes and to recover some of the remaining common line costs through a presubscribed line charge. The Order also grants some additional downward pricing flexibility for transport interconnection charges in LATA 132.

I write to emphasize several aspects of this Order including its context in light of other issues regarding competition in access and local exchange that are currently before the Commission. First, given the substantial presence of competing access providers (CAPs) in the New York City metropolitan area, I support this decision because of the importance of taking proactive steps to remove regulatory barriers that inhibit the further development of exchange and access competition. In doing so, this decision provides a more certain basis for investment, as well as the consumer and industry benefits, that are precluded by NYNEX's current access charge structure that fails to reflect the effects of competition by lumping these charges with unrelated costs, thereby preventing lower recovered access costs. In this regard, the limited waiver for LATA 132 is appropriate to reflect that data regarding evidence of entry and activity by CAPs has not been presented to reflect similar conditions outside LATA 132 in the remainder of the NYNEX region.

This decision also continues the review of access reform plans currently before the Commission, including our previous decision on the Rochester Open Market Plan and a pending

proposal by Ameritech.[1] Along with the Commission's recent decisions on expanded interconnection and LEC price caps,[2] these access reform plans will continue to establish the terms under which a greater level of competing service will be offered to end users, especially to the extent that we are not yet at a point where the public can rely solely on the market to set prices for all services, especially with respect to services provided to residential areas. I also look forward to addressing the issue of rate structures in an evolving competitive environment in the context of the Further Notice of Proposed Rulemaking on LEC price caps.[3] I continue to believe that changes in the local exchange marketplace, such as those competitive conditions demonstrated in LATA 132, will underscore the importance of transitioning toward a streamlined regulatory structure that would recognize instances where sources of competition are evident in the local marketplace.

I am concerned, however, given the number of access reform waivers presented to the Commission, that important public consequences may result from treating these and subsequent access reform issues on a waiver basis rather than establishing a set of principles or general guidelines for evaluating future market situations. As a result, I believe that it may be necessary for the Commission to take the further initiative in a rulemaking to establish criteria or guidelines for the competitive and regulatory changes that will warrant granting flexibility in access charge structures.

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[1] See Memorandum Opinion and Order, Rochester Telephone Corporation Petition for Waivers to Implement its Open Market Plan (released march 7, 1995); Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (filed March 1, 1993).

[2] See Expanded Interconnection with Local Telephone Company Facilities,CC Docket No. 91-141, Memorandum Opinion and Order, (adopted July 14, 1994). See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132 (released April 7, 1995).

[3] See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No 94-1, FCC 95-132 (released April 7, 1995).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *NYNEX Telephone Companies' Petition for Waiver; Transition Plan to Preserve Universal Service in a Competitive Environment*

Today, based on changing competitive conditions in New York City and Long Island, we grant NYNEX a limited waiver of interstate access charge rules. I wholeheartedly support this decision.

Our action today demonstrates our steadfast determination to promote local competition at every opportunity. The Commission has expended considerable time and energy in the effort to bring competition to the local delivery of multichannel video programming, via video dialtone. We also seek to encourage competition in local telephone services. The waivers we granted last month for Rochester Telephone represented one modest contribution on our part to the development of a more competitive local telephone marketplace. Today's action is another timely step forward.

This decision also illustrates our responsiveness to changing circumstances. We must not let our hopes distort our perception of realities, but genuine and substantial marketplace changes should be accommodated with corresponding measures of regulatory flexibility. In this instance, we are waiving our rules upon a compelling showing of special circumstances, based on our assessment of the present market conditions and future prognosis for competition in LATA 132 -- and our confidence that consumers throughout NYNEX's service area will be protected against negative impacts.

Our decision today is testimony to the importance of cooperation in the construction of a new competitive framework. The New York Public Service Commission has shown extraordinary leadership in creating conditions for increased competition. NYNEX has embraced change instead of fighting it, allowing competitors to collocate their equipment in NYNEX's offices and

successfully negotiating mutual compensation and other complex issues with several competitive service providers. Those providers have relentlessly sought to accelerate the pace of change -- and to make the benefits of competition more widely available. I applaud them all.

The significance of today's ruling should not be overstated. Our action here is an individualized waiver, not our final blueprint for the transition to competition. Even in the New York marketplace, barriers to competition still remain, and robust, sustainable competition is not yet guaranteed. Accordingly, we will need to monitor closely the results of today's action in LATA 132 -- and improve our tools for assessing when competitive developments in other markets may justify waivers or rule changes.

As we continue our focus on local competition, we must remain attentive to the interplay between competition and universal service. Competition brings lower prices and increased choices for consumers (among other benefits), and it can thereby help us fulfill our universal service responsibilities by making services more attractive and accessible. But in today's environment universal service depends on subsidy flows that will not be altogether sustainable in a changed environment. We therefore need to reevaluate our universal service objectives and mechanisms in light of emerging competition, and we are doing just that within this agency and in collaborative efforts with state regulators and the National Telecommunications and Information Administration.

Meanwhile, we must press relentlessly forward with efforts to promote competition, as we are doing today.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: The NYNEX Telephone Companies' Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment

"Timing is everything." That often-used adage has particular relevance in the context of this proceeding. As we move along the continuum from monopolistic exchange and access markets toward a more competitive environment, we confront a classic regulatory dilemma involving timing: When is it appropriate to afford an incumbent, monopolistic service provider pricing flexibility in order to address competitive challenges from new entrants?

If pricing flexibility comes too early, the incumbent might use that flexibility in ways that could thwart nascent competition, contrary to the public interest. For example, the incumbent might exercise market power that it possesses over other services to cross-subsidize prices for more competitive services in order to undercut new entrants and drive competitors from the market. Similarly, pricing flexibility that comes too late presents other public interest difficulties. To the extent that existing regulation (devised in a monopoly environment) continues to require an incumbent to price certain services substantially above relevant costs in order to subsidize lower prices for other services, such above-cost prices send distorted signals to new entrants and consumers. In such circumstances, inefficient investment and entry decisions may result, consumers may pay higher rates, and the incumbent might suffer a loss of market share through no fault of its own.

The trick, then, is to grant flexibility to the incumbent while competition is taking hold – neither too early, nor too late. This is not an easy task, but we must not shrink from it. If our timing is right, all competitors can compete fairly in the marketplace on price, innovation and service quality. If we are on target, consumers, rather than regulation, will determine winners and losers in the marketplace.

The record in this case demonstrates that the competitive environment in the New York City metropolitan area has advanced to the stage that it is appropriate to grant NYNEX some pricing flexibility through a limited waiver of our access charge rules. Given the uncommon nature of competitive development and the large concentration of high-volume business customers in this particular area, continued strict adherence to our existing pricing rules would not serve the public interest in facilitating fair, vigorous and efficient competition in the New York City metropolitan area. Rather, deviation from the existing rules in these circumstances will better serve these public interest goals. I support

this decision because I believe that NYNEX has demonstrated good cause for a limited waiver of our rules at this time. I emphasize, however, that our action is based on the competitive circumstances that have been developed on the record before us. Any future requests for similar or different pricing flexibility by NYNEX in other areas, or by other carriers, will stand or fall on their own merits.

Finally, I believe that we must get on with the business of reforming our regulation to facilitate and accommodate the emergence of competition in exchange and access markets. I believe we need to closely examine our Part 69 access charge pricing rules to see if they enable carriers to recover their costs in a rational, efficient manner as we transition to more competitive markets. Likewise, I believe that we need to challenge existing notions and mechanisms regarding universal service. While our commitment to universal service should not waver, all subsidies supporting universal service – both explicit and implicit – should be examined to see whether they continue to make sense in today's rapidly changing world of telecommunications.

I end where I began – "timing is everything." I believe the time is right to afford NYNEX the limited pricing flexibility described in this order. As competition begins to emerge in a specific area, the old ideas and approaches that were developed in a monopoly environment are sorely tested, as the NYNEX situation demonstrates. But beyond considering individual requests by carriers for pricing flexibility, I believe the time is also right to undertake a broader examination of our access charge and universal service rules and policies to see if we can adjust our regulation to foster the inevitable tide of competition. In my view, it is important that we begin this process as soon as possible. I urge my colleagues to give these issues a high priority.